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ARTICLE

Time to (Finally) Reinstall the Author in EU Copyright Law: From Contractual Protection to Remuneration Rights

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Abstract The fair remuneration of authors and performers for the exploitation of their work is at the core of the rationales of copyright and related rights. Furthermore, the remuneration of creators benefits form a strong fundamental rights justification at the international and European level. However, the copyright system has since its inception poorly delivered on this objective, the revenues generated by the exploitation of creative works being still often unfairly distributed to authors and performers. Most recently, their revenues have also been affected by crises like the COVID-19 pandemic and the increasing use of generative AI technologies to output works potentially competing with those of human creators. The EU Digital Single Market Directive introduced for the first time in EU law general copyright-contract rules to protect the authors and performers in their contractual relations with derivate rightholders (Arts. 18–22 Directive (EU) 2019/790 ("CDSMD")). However interesting and positive these rules are in theory, there are doubts that a "contractual-only" protection brings the expected results in practice since it requires the creators to turn against their producers to demand the revision of their agreement,

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which very often carries negative consequences for creators. National experiences with copyright contract rules have shown little results so far. Therefore, other mechanisms securing that a fair remuneration flows directly back to creators should urgently be considered. Effective implementation of the principle of appropriate and proportionate remuneration of authors and performers pursuant to Art. 18 CDSMD and, more generally, of the fair remuneration rationale of copyright law, thus must result from the combination of several mechanisms that cannot be easily circumvented and which secure efficient revenue flows to creators without burden them excessively with enforcement obligations. In this context, the article argues that wider use of remuneration rights appears the better way forward. Tracing the latest developments, it explores the policy options to implement the different types of remuneration rights (i.e., residual, other per se, and "limitation-based"). It analyzes several national experiences and pending CJEU referrals to identify clear principles for the development, at the EU and international level, of better-functioning remuneration systems for creators, thus securing that the copyright system can (finally) fulfil one of the main functions for which it has been established.

Keywords Copyright Law · European Union · Authors and performers · Copyright in the Digital Single Market Directive · Copyright's rationale · Remuneration · Remuneration rights

1 Introduction: The Fair Remuneration of Creators at the Core of the Rationales of Copyright

The fair remuneration of authors and performers[1] is at the core of the rationales of copyright and performers rights. Indeed, copyright provides incentives to create for the benefit of society, by securing creators a fair remuneration for the use of their works and by fostering the well-functioning of markets. Doing so, it secures creators' personal autonomy and self-determination, allowing them to create and express themselves freely.[2] In this manner, copyright law has been described as "the engine of free expression".[3] It aims to protect creators from all risks of censorship and strengthens their independence from the interference of others (e.g., patrons,

[1] The position of the performers is often assimilated to that of authors because of the similar weak bargaining position vis-à-vis creative enterprises and platforms and their proximity with the author's rights due to the creative input of performers, giving performers rights a different justification than other neighbouring rights. The CDSMD continues the process of approximation between authors' copyright and performers' related rights started with the Directive 92/100/EEC. For the purposes of this article, "creators" includes both authors and performers.

[2] *See* Recs. 9–11 Directive 2001/29/EC. *See* Opinion AG Szpunar, 12 December 2018, Case C-476/17, *Pelham and others*, EU:C:2018:1002, para. 83: "the main objective of copyright and related rights is to promote the development of the arts by ensuring artists receive revenue from their work, so that they are not dependent on patrons and are free to pursue their creative activity". *See*, for an analysis of the worldwide dimension of the need to ensure a fair remuneration for authors, according to the different justifications of copyright law, Senftleben (2018), p. 413.

[3] *See*, in a comparative perspective, *Harper & Row Publishers Inc. v. Nation Enters*, 471 U.S. 539, 559 (1985).

sponsors and States), enhancing the creative process and the production of new works.

Furthermore, the remuneration of creators benefits from strong fundamental rights justification.[4] It can be grounded within the freedom of expression and freedom of the arts,[5] but also within the right to science and culture,[6] the right to human dignity,[7] the right to (intellectual) property,[8] the right to choose an occupation and live from their work[9] and the freedom of contract and freedom to conduct a business within the social market economy.[10] From the fundamental rights framework, it is possible to extract a general right for creators to be fairly remunerated for the commercial exploitation of their work unless the use of their works benefits from a stronger justification by competing fundamental rights, which stands as a fundamental and binding principle of copyright law.[11] It is not without

[4] *See*, on the "constitutionalization" of intellectual property law, Geiger (2006), p. 1133, with further references. *See also* Geiger and Jütte (2024), p. 1022: "It is for the national and European legislatures to draw the contours of copyright by imposing appropriate criteria that take account of the nature and social function of copyright, whilst also ensuring that authors participate fairly in the exploitation of their works". *See also*, on the strong influence of fundamental rights on the IP case law of the CJEU and ECtHR, Izyumenko and Geiger (2025).

[5] Article 13 Charter of Fundamental Rights of the European Union ("EUCFR"); Art. 19 International Covenant on Civil and Political Rights ("ICCPR").

[6] Article 27(2) Universal Declaration of Human Rights ("UDHR"); Art. 15(1)(c) International Covenant on Economic, Social and Cultural Rights ("ICESCR"), which recognizes the right of everyone "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

[7] Article 1 EUCFR.

[8] Article 17(1) and (2) EUCFR; Art. 1 of the Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").

[9] Article 15 EUCFR.

[10] Article 16 EUCFR.

[11] *See* Geiger (2024), p. 1135–1136: "The author must be fairly remunerated in the event of the commercial use of his work in the absence of justification to do so that derive from competing human rights"; Geiger (2022b), pp. 90–91: "a conceptualization of copyright within the constitutional right to science and culture, to freedom of expression and artistic creativity and even within a socially rooted property clause [...] should lead to the recognition of an overarching and unwritten right for creators to be remunerated for the commercial exploitation of their work. This right should be understood as a fundamental and binding principle of copyright law deriving from fundamental rights and from copyright's social function, and would thus have to be recognized by legislators through the implementation of appropriate mandatory copyright contract rules or statutory remunerations rights; it could also be used by the judiciary as an interpretation tool of existing Trules to redress unfair remuneration situations for creators, or, in their absence, even beyond as a general principle of law". *See also*, in this spirit, Shaheed (2014), para. 100: "Merely enacting copyright protection is insufficient to satisfy the human right to protection of authorship. States bear a human rights obligation to ensure that copyright regulations are designed to promote creators' ability to earn a livelihood".

meaning that in Europe the legislation is named almost everywhere "author's right".[12]

Despite the importance of securing fair remuneration, the copyright system has, since its inception,[13] poorly delivered on this objective, and the distribution of the revenues generated by the creative works is still often unfair for authors and performers.[14] Due to their weak bargaining power, they are often unfairly disadvantaged vis-à-vis the creative industries and other businesses relating to the exploitation of their creative works, which ultimately results in obstacles in their artistic and creative process. Recent findings show that the current system of exclusive rights only rewards the top-selling creators, incentivizing a "winner-take-all" market.[15] This strongly suggests that there is a need to find other ways to secure the material interests of creators.

The unstable and uncertain remuneration of authors and performers has always been a general problem of copyright law. However, it propagates much more intensively nowadays. Indeed, digital developments modify the exploitation avenues, the production methods, and the consumption habits of cultural works. This leads to further unfair income distribution, as they often do not participate sufficiently in the revenues generated by the digital consumption of their works.[16]

[12] *See*, Italian: *diritti d'autore*; French: *droits d'auteur*; German: *Urheberrecht*; Bulgarian: авторски права; Spanish: *derechos de autor*; Czech: *autorské právo*; Danish: *ophavsret*; Estonian: *autoriõigus*; Greek: Πνευματικά δικαιώματα; Croatian: *autorska prava*; Latvian: *autortiesības*; Lithuanian: *autorių teisės*; Hungarian: *szerzői jogok*; Maltese: *id-drittijiet tal-awtur*; Dutch: *auteursrecht*; Polish: *prawo autorskie*; Portuguese: *direitos de autor*; Romanian: *drepturile de autor*; Slovak: *autoreské právo*; Slovenian: *avtorska pravica*; Finnish: *tekijänoikeus*; Swedish: *upphovsrätt*.

[13] *See*, for a historical approach, Geiger (2010b), p. 134, concluding that: "little seems to have evolved for authors since the Statute of Anne from 300 years ago. The interests of authors continue to be put forward by producers to serve their own interests. The rhetoric of the 'poor author' still pays when it comes to expand the legal protection. […] But, nowadays, how many authors really fairly participate to the exploitation of their works?". *See also* Geiger (2004).

[14] Evidence is provided by several studies. *See*, *ex multis*, with general scope, Valais (2025); Nunu et al. (2025); European Parliament et al. (2023); European Commission (2023); Kammerhofer-Schlegel et al. (2023); European Commission (2023); Carre et al. (2023); Thomas et al. (2022); AEPO-ARTIS (2018); Dusollier et al. (2014); Dusollier (2018); Mazziotti (2020); UNESCO (2019); Gibson et al. (2015); Gompel et al. (2015). With reference to the audiovisual sector, Ehlinger et al. (2025); Ehlinger et al. (2024a); CISAC (2023); Willekeans et al. (2019). With reference to the music sector, Johansson (2024); Renard and Milt (2023); Legrand (2022); Castle and Feijóo (2021); DiCola (2013). With reference to the book publishing sector, Ehlinger et al. (2024c); Thomas et al. (2023a); Thomas et al. (2023b); Thomas et al. (2022); Kretschmer et al. (2019); Thomas et al. (2018); Salamanca and Guibault (2016); Kretschmer and Hardwick (2007). With reference to the visual art sector, Kretschmer et al. (2011); Ehlinger et al. (2024b). With reference to freelance journalists, Thomas et al. (2024).

[15] Ehlinger et al. (2024a, b, c), p. 16, with reference to independent writers: "as is typical in cultural markets, indue authors work in a 'winner takes all' market, with a few superstar authors earning a disproportionately bigger take of the total net worth. In 2022, […] the top 10% earned […] 71% of the total revenues". Thomas et al. (2023a), p. 7, with reference to general writers: "As of 2022, the top 10% of authors earn about 47% of the total income of the population. This is not an atypical distribution of income when considered alongside other creative industries". *See also* Kretschmer et al. (2010), pp. 3 and 33.

[16] *See*, *e.g.*, European Parliament (2021), para. 22: "the practice by dominant or large streaming platforms of imposing buy-out clauses [that] deprives authors of their royalties and hinders adequate and proportionate remuneration for creators".

These imbalances create shortcomings for the copyright goals and a general loss of acceptance of the system in the perception of society.[17]

Most recently, despite the increase in online uses, authors and performers have faced a significant drop in revenues as a result of limitations of live performances and public events due to the COVID-19 pandemic.[18] Moreover, the recent mass use of generative AI technologies able to output works potentially competing with those of human creators made explicit how precarious the condition of authors and performers is. This resulted in increased calls to design solutions which provide for efficient remuneration mechanisms for creators for the use of their work by generative AI companies.[19]

Over time, EU copyright harmonization has been focused mainly on the economic rationales targeting the interests of rightsholders, without actually differentiating within the rules between original rightsholders (i.e., authors and performers) and their successors in title (i.e., creative industries and other intermediaries). This perpetuated a very misleading equation: the interests of rightholders are identical to those of the creators. This allowed the cultural industries to put forward the interests of creators in the policy debate when it was actually the derivative rightsholders who would benefit the most from the strengthening of exclusive rights, not the creators. In fact, pointing to the need of authors or more general cultural interests has always carried a strong sympathy potential among policymakers and the general public, authors therefore serving as

[17] *See* EUIPO (2017), p. 8: "There is a continuing trend of associating IP protection with the 'elite', such as large companies and famous artists. […] At the same time, respondent think that consumers like themselves benefit to a much lesser extent"; EUIPO (2023), p. 6: "While the percentage of Europeans that report having intentionally bought counterfeit products remains low, at 13%, this is higher than in previous editions of the study". *See also* Senftleben (2018), pp. 421–422: "If copyright only serves as a vehicle to vest the creative industries with strong rights in information products while these rights are defended as a means to remunerate authors, the creators of literary and artistic works only function as a dummy to conceal the industry's insatiable appetite for continually expanding exclusive rights. As a result, the arguments advanced in favor of copyright can be unmasked as false rhetoric and the system's social legitimacy is put at right. To avoid this erosion of copyright's acceptance in society, the lawmaker can seek to reduce the exposure to market forces and adopt measures that strengthen the position of creators vis-à-vis the creative industry"; Ginsburg (2017), p. 62: "the disappearance of the author […] justifies disrespect for copyright".

[18] *See also* UNESCO (2022), p. 3: "the cultural and creative sectors were among the hardest hit by the pandemic, with over 10 million jobs lost in 2020 alone"; Culture Action Europe and Dâmaso (2021), p. 6: "COVID-19 accelerated pre-existing trends and inequalities, which created a sense of urgency to tackle the situation on a European level". Montalto et al. (2020), p. 27: "Data from Eurostat show that in EU-27 32% of persons working in culture are self-employed, compared to 14% in overall employment. […] Effective protection of non-standard workers is crucial to cope with the socio-economic inequalities that the COVID-19 pandemic risk to magnify". IDEA Consult et al. (2021), p. 9: "Pre-COVID-19, the Cultural and Creative Sectors (CCS) were already characterised by fragile organisational structures and working practices. The fragmented organisation of value chains, the project-based working and the (not well-protected) Intellectual Property (IP)-based revenue models are only a few elements contributing to this". *See*, outside Europe, Cultural Relations Platform et al. (2021), p. 3: "cultural actors are among the most vulnerable groups in the economy […]. The impact of the COVID-19 pandemic was severe and affected all partner countries". European Parliament (2021): "the COVID-19 pandemic and lockdowns severely limited the possible revenue streams for the vast majority of artists, performers and cultural workers" (para. AA), as the recent "change in economic paradigm represents [also] a challenge in terms of stability of revenue" and "amplified the dependency of artists and users on the dominant digital platforms" (para. 22).

[19] *See* Geiger (2024); Senftleben (2024) and (2023); Gervais (2022).

perfect *faire valoir* for measures that would benefit mainly the industry and its financial interests. Despite a few specific measures,[20] uniform mechanisms to safeguard the remuneration interests of authors and performers were until recently still missing,[21] albeit existing in different forms and levels of protection in many Member States.[22] One of the reasons is that EU competencies in the EU Treaties have been centered mainly on the implementation of the internal market, neglecting ethical and social imperatives[23] and the distributive justice rationales of the copyright system.[24]

The EU legislature finally paved the way for stronger and harmonized strategies to secure fair remuneration for authors and introduced for the first time in EU law general copyright-contract rules as an element of "fairness" of copyright-focused markets within the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market[25] ("CDSMD"). The intention was to enable authors and performers "to fully benefit from the rights harmonized under Union law"[26] and to have a fair share of the value stemming from the commercial exploitation of cultural works and subject matter.

As the transposition process of this text is now concluded within almost all Member States, litigations and preliminary rulings to clarify the scope of these provisions have started. The principles established in the CDSMD contribute to a new framework for devising effective tools to secure fair remuneration for authors and performers. In particular, the principle of appropriate and proportionate remuneration expressed by Art. 18 CDSMD appears to be a further step to enhancing of the fair remuneration rationale behind copyright law, which is particularly relevant for designing a fair and sustainable system, especially in the digital era.

However, even if interesting and positive in theory, there are doubts that a "contractual-only" protection brings the expected results in practice since it requires the creators to turn against their producers in case of unfair agreements with regard to their remuneration. National experiences with copyright contract rules

[20] *See*, *e.g.,* Art. 3(4) and (5) Directive 2006/115/CE; Art. 5 Directive 2006/115/CE; Art. 3(2bis) Directive 2006/116/CE; Art. 3(2ter) Directive 2006/116/CE.

[21] It seems therefore surprising that the European Commission (2004), p. 13, concluded: "the degree of common ground regarding the rules on copyright contracts across Member States appears to be sufficient, so as not to necessitate any immediate action at Community level".

[22] *See*, for a comparative study on the provisions existing before the CDSMD, Dusollier et al. (2014); Guibault and Hugenholtz (2002).

[23] The strong market focus has been criticized by many scholars. *See*, *ex multis*, Geiger (2013), p. 175: "at European level, […] the highest legally binding instrument (the Treaty on European Union) clearly states that the Union "shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at fully employment and social progress […]".

[24] *See*, more generally, on the distributive justice rationale, Hughes and Merges (2017).

[25] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[26] Rec. 72 CDSMD.

have shown little results. Therefore, other mechanisms securing that a fair remuneration flows directly back to creators should urgently be considered.[27]

This view seems also shared by the European Parliament, which, in its Resolution on the situation of artists and the cultural recovery in the EU, explicitly "regrets the fact that […] only a few Member States have seized the opportunity provided by Art. 18 to implement appropriate remuneration mechanisms".[28] Consequently, it "urges the Member States to translate Art. 18 of Directive (EU) 2019/790 into effective remuneration mechanisms"[29] and the European Commission to "promote collective rights management in the implementation of the recently adopted directives on copyright, as well as in its forthcoming initiatives to ensure the fair remuneration of creators and wide access to cultural and creative works for the public"[30] and to monitor the "effective implementation of these key principles",[31] thus emphasizing the importance of securing effective remuneration for authors and performers within the copyright system. This position has also been reaffirmed in other recent position documents both from the European Parliament and the European Commission, which call for exploring fairer remuneration models.[32]

This article argues that a genuine implementation of the remuneration rationale of copyright law can only be the result of the combination of several mechanisms. In particular, remuneration rights offer better alternatives than copyright contract rules and could represent more efficient mechanisms to implement the fair remuneration principle introduced by Art. 18 CDSMD. Remuneration rights are mechanisms that provide creators with a right to be remunerated for the use of their works, often via collective management organizations. Most of the time unwaivable, they present major advantages vis-à-vis traditional contractually-agreed remuneration. In recent

[27] *Cf.* European Copyright Society (2023), p. 2: "EU copyright framework needs to be ameliorated in this regard and the articles 18 sq of the CSMD directive (the so-called 'copyright contract law' rules) cannot be the final word on this issue. Other mechanisms securing that a fair remuneration flows directly back to creators should be additionally considered in the future".

[28] European Parliament (2021), para. 15, first sentence.

[29] European Parliament (2021), para. 15, second sentence.

[30] European Parliament (2021), para. 16. *See also* para. 41: "[The European Parliament] underlines the importance of remuneration for authors and performers online and offline, specifically through the promotion of collective bargaining".

[31] European Parliament (2021), para. 13, second sentence.

[32] *See* European Parliament (2023), para. 24, which: "calls on the Commission to support the Member States in ensuring an adequate, fair, appropriate and proportionate remuneration for artists and creators for the exploitation of their artistic work, with appropriate mechanisms and through general and sector specific social dialogue, in line with Union legislation". *See*, in response to this, European Commission (2024), which: "welcomes the Parliament's resolution, support its political objectives and confirms that it intends to kick off work in this area" (p. 1) and "is committed to ensuring an effective transposition and application of the Directive on Copyright in the Digital Single Market" (p. 4). *See also* European Parliament (2024), para. H: "there is a need to explore fairer models of streaming revenue allocation for authors and performers, by looking into different available mechanisms, such as pro-rata and user-centred models or totally new one*s*".

times, the implementation of remuneration rights in different Member States resulted in several CJEU referrals.[33] These proceedings offer a good opportunity to reflect on the development of clear principles for the development of remuneration rights at the EU and international levels.

After a brief analysis of Arts. 18–22 CDSMD (Part 2), this article will demonstrate why a contractual-only protection for authors and performers presents weaknesses. These are due to proven difficulties of direct negotiations and reticence of authors and performers to enforce rights. Effective implementation of the principle of appropriate and proportionate remuneration of authors and performers pursuant to Art. 18 CDSMD and, more generally, of the fair remuneration rationale of copyright law, thus must result from the combination of several mechanisms that cannot be easily circumvented and which secure efficient revenue flows to creators without burden them excessively with enforcement obligations (Part 3). In this context, the article argues that wider use of remuneration rights appears the better way forward. Tracing the latest developments, it explores the policy options to implement the different types of remuneration rights (i.e., residual, other per se, and limitation-based) (Part 4). The conclusion summarizes findings and considerations (Part 5).

2 The Fair Remuneration in Exploitation Contracts within the CDSMD

The CDSMD revolutionized very different aspects of EU copyright law.[34] The third chapter of the fourth title, titled "Measures to achieve a well-functioning marketplace for copyright", is devoted to the "fair remuneration in exploitation contracts of authors and performers". Articles 18–22 CDSMD entitle authors and performers, in the context of a license or transfer of exclusive rights for the exploitation of their works or performances, to receive appropriate and proportional remuneration (Art. 18 CDSMD), as well as transparent information on the exploitation (Art. 19 CDSMD), alternative dispute resolution procedures (Art. 21

[33] CJEU, Case C-797/23, request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Italy) lodged on 21 December 2023 – *Meta Platforms Ireland Limited v Autorità per le Garanzie nelle Comunicazioni*; Case C-37/24, request for a preliminary ruling from the Curtea de Apel Bucuresti (Romania) lodged on 19 January 2024 – *DADA Music SRL, Uniunea Producătorilor de Fonograme din România (UPFR) v Asociatia Radiourilor Locale si Regionale (ARLR)*; Case C-663/24, Request for a preliminary ruling from the Cour constitutionnelle (Belgium) lodged on 9 October 2024 – *Google LLC, Google Ireland Ltd, Spotify Belgium SA, Spotify AB, Spotify België nv, Meta Platforms Ireland Limited, Streamz SRL, Sony Music Entertainment Belgium SA, Universal Music SA, Warner Music Benelux SA, Play it again Sam SRL, North East West South SA, CNR Records SA, Belgian Recorded Music associations ASBL v Premier minister*; Case C-496/24, Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 17 July 2024 – *Stichting Onderhandelingen Thuiskopie vergoeding, Stichting de Thuiskopie v HP Nederland B.V., Dell B.V., Stichting Overlegorgaan Blanco Informatiedragers*; C-840/24, Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 10 December 2024 – *VG Wort (Verwertungsgesellschaft Wort) v TL.*

[34] *See*, for a general overview on the rationales underlying the CDSMD, Rosati (2021), Scalzini (2023).

CDSMD), and the adjustment (Art. 20 CDSMD) or revocation (Art. 22 CDSMD) of unfair existing contracts. Despite a few exceptions,[35] such rules apply to any exploitation contract, not being limited to specific sectors or specific uses. Albeit framed in a text entitled to the "digital single market", no distinction is made between analog and digital exploitation.

The following paragraphs illustrate the principle of appropriate and proportionate remuneration in exploitation contracts pursuant Art. 18 CDSMD (I) and then the *ex post* contractual measures pursuant Arts. 19–22 CDSMD (II),[36] in order to discuss the open issues raised by the model designed by the CDSMD.

2.1 The Principle of Appropriate and Proportionate Remuneration in Exploitation Contracts

The core of this set of rules is Art. 18 CDSMD. Pursuant to Art. 18(1) CDSMD, Member States are required to entitle authors and performers "to receive appropriate and proportionate remuneration" when they "license or transfer their exclusive rights for the exploitation of their works or other subject matter".

The text does not explicitly define the concepts of "fairness", "appropriateness" and "proportionality". Doing so, it leaves open the scheme and the quantification of the remuneration. Recital 73, first sentence, CDSMD seeks to clarify the interpretation of these terms, by binding the remuneration to "the actual or potential economic value of the licensed or transferred rights", considering "all the circumstances of the case" (e.g., "the author's or performer's contribution to the overall work", "market practices" or "the actual exploitation of the work") and affirming that a lump sum payment can constitute proportionate remuneration only in exceptional cases. However, these concepts are still quite vague. Their determination could be even more difficult for digital uses, as new business models for the exploitation of cultural works are constantly developing (e.g., subscription-based or advertisement-supported), and where established practices may not yet exist.[37] This means flexibility, but also lack of legal certainty, both for creators and for the creative industries.[38] In particular, "appropriate" and "proportionate" are within Art. 18 CDSMD two distinct terms and should receive separate interpretations.

[35] General exclusions are provided in case of authors of computer programs (Art. 23(2) CDSMD), contracts without the purpose of exploitation of works or performances (*e.g.,* some employment contracts; where the contractual counterpart acts as an end user) (Rec. 72, second sentence, CDSMD) and authorization to use the work or other subject matter for free (Rec. 82 CDSMD).

[36] *See*, for other general comments of this provisions, Bossi (2023); Hugenholtz (2022); Rosati (2021); Paramythiotis (2021); European Copyright Society (2020); Bertani (2020); Xalabarder (2020a), pp. 129–162; Dusollier (2020); Priora (2019a); Priora (2019b).

[37] *See* European Copyright Society (2020), pp. 137–138, which "regrets that some issues particularly related to digital exploitation were not given closer consideration. […] In order to ensure a better protection for creators in this evolving environment, the changed economic context needs to be reflected in modified contractual provisions, including tailored modes of calculation of revenues to which authors and performers are entitled".

[38] *Cf.* Paramythiotis (2021), p. 83: "This could probably also put pressure on publishers and producers to negotiate minimum tariffs on a collective level to achieve legal certainty".

The lack of clarity on the term "appropriate" could be a double-edged sword and can undermine the effectiveness of the principle. Indeed, national case law[39] showed the need to rely at least on some benchmarks to test the "adequateness" of the remuneration (e.g., through common remuneration rules, customary schemes, minimum thresholds established by collective agreements or administrative authorities, or legal presumptions). As a claimant, the author or the performer has the burden of proof and it may be difficult to provide evidence of customary remuneration or of fair remuneration in comparable circumstances.[40] Finally, the need to consider the extent of contribution may further complicate the assessment, also given that copyright and related rights are not subject to formalities.

"Proportionate" is used in the English version of the text. In other versions, it oscillates between "proportionate", meaning a reasonable amount (and being close to "appropriate"), or "proportional", referring to a proportion or percentage of the revenues. While the interpretation of the concept in terms of proportionality to the economic value of the right seems more concrete, as it can link the remuneration to a percentage of the actual revenues, particular attention should be devoted to the problem that when the percentage is very low the remuneration is low too.[41] Therefore, sometimes, the possibility to opt for a lump sum, in justified cases, eventually complemented with percentage-based remuneration rates, could be a workable option to ensure fair remuneration.[42] Here, flexibility grounded in the circumstances of each case can play an important role.

Pursuant to Art. 18(2) CDSMD, the mechanisms to implement the principle are left to the Member States' freedom to choose the domestic legal tools, according to the national copyright rules and principles, and by taking "into account the principle of contractual freedom and a fair balance of rights and interests",[43] beside the compliance to EU law.[44] What these mechanisms should be is matter of debate. Part of the doctrine argues that the *ex post* contractual measures pursuant to Arts. 19–22 CDSMD are enough to implement Art. 18 CDSMD.[45] Others support further

[39] *Cf.* German Federal Court of Justice, 7 October 2009, Cases I ZR 38/07 and I ZR 230/06, available (in German) at https://perma.cc/7Z2F-TLKZ.

[40] According to Xalabarder (2020a): "'Appropriate' would also require that the remuneration is adjusted to cultural and economic circumstances of each country and market, and to the different markets and means of exploitation".

[41] This problem is particularly evident in the French Copyright Contract Law. *See* Art. L.131-4 French Intellectual Property Code, which expressly lists the cases in which lump sum payments are admitted.

[42] Recital 73, second and third sentence, CDSMD. *See also* Dusollier (2020), p. 1023; Xalabarder (2020a).

[43] Such freedom is only constrained by the goal to secure an "appropriate" and "proportionate" remuneration, although the spectrum of the tools to implement is very broad and should also take into consideration the interests of the creative businesses not to lose incentives to bear the economic risk of investing in creative productions and not to be overburdened with difficult compliance to the obligations set forth by the new rules. *See*, in particular, Scalzini (2021b).

[44] *See* Rec. 73, fourth sentence, CDSMD. *See*, *e.g.,* the limitations for Member States' discretionality in CJEU, 9 February 201, Case C-277/10, *Luksan v. Petrus van der Let*, EU:C:2012:65.

[45] *Cf.* Rosati (2024), p. 6: "[Art. 18 CDSMD] serve as an umbrella provision that ties together the subsequent Articles 19 to 23 CDSMD" and "[Arts. 19–22 CDSMD] are how the overarching principle expressed in Article 18 may find externalization and, thus, realization".

interventions, including for example remuneration rights.[46] This article will defend this second position.

2.2 The *Ex Post* Contractual Measures

Articles 19–22 CDSMD establish contractual protections that relate specifically to the relationships after the signature of the contract and that contribute to the effectiveness of the principle of appropriate and proportionate remuneration. Article 23 CDSMD makes them not overridable by contract, with the sole exclusion of the right of revocation of the license or transfer of rights where there is a lack of exploitation pursuant to Art. 22 CDSMD.[47] Recital 81 CDSMD suggests their mandatory nature under private international law rules.

Article 19 CDSMD requires Member States to introduce transparency rights for authors and performers in order to monitor the exploitation of the transferred or licensed rights and mirror the provision already existing for collective management organizations ("CMOs") and independent management entities ("IMEs").[48] Indeed, the lack of transparency on the actual exploitation of works and performances, on the revenues generated, and on the remuneration due, is the ground of the information asymmetries that, among other factors, triggered the need for legal reform.[49] Such information asymmetries on the economic value of the rights transferred or licensed are exacerbated by the exploitation of the productions through online platforms, which challenged the traditional value allocation through the exploitation chain.[50] Therefore, Art. 19 CDSMD provides for a "transparency obligation" by entitling authors and performers to receive from their contractual counterparties and their successors in title "up to date, relevant and comprehensive information" on the exploitation of their works and performances. Such information shall be provided "on a regular basis, at least once a year, and taking into account the specificities of each sector"[51] (e.g., music, audiovisual, or publishing sector). Recital 75 CDSMD specifies that the content of the information has to cover "all sources of revenues relevant to the case, including, where applicable, merchandising revenues". This specification is important as it allows to consider also new monetization models, such as advertising revenues which are very relevant in the digital economy. Recital 75 CDSMD requires, moreover, that such information should not only allow the "effective assessment of the economic value of the rights in question" but should also be provided in a "comprehensible manner", thus

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[46] *See*, *e.g.*, European Copyright Society (2020), p. 142; Xalabarder (2018); Xalabarder (2020b). *See infra* 3.2.

[47] *See infra* 2.2.

[48] Article 18 Directive 2014/26/EU. Indeed, according to Art. 19(6) CDSMD, when this latter provision is applicable, the transparency obligation under CDSMD does not apply in respect of agreements concluded by CMOs, IMEs or other entities.

[49] *See* Rec. 75 CDSMD.

[50] *See* Mazziotti (2020).

[51] Article 19(1) CDSMD.

underlying the protection of the contractual weaker party. Another "remarkable"[52] novelty of Art. 19 CDSMD concerns the extension of the transparency obligation also to the sub-licensees which exploit the rights, when the first counterparty is not able to provide all the relevant information to assess the economic value of authors' and performers' rights.[53] The CDSMD thus empowers authors and performers to, directly or indirectly, ask information also to sub-licensees (e.g., music streaming platforms or e-books providers) in order to track the current exploitation and the economic value generated. In order to balance the transparency needs with the burden upon businesses, in "duly justified cases", Member States may decide to limit the obligation to "the types and level of information that can reasonably be expected in such cases"[54] and to exclude the obligation "when the contribution of the author or performer is not significant".[55] Member States may decide whether implementing only the minimum mandatory standard or going further.[56] Collective bargaining is considered as an option to reach a transparency agreement.[57]

Article 20 CDSMD is complementary to Arts. 18 and 19 CDSMD. It establishes a "contract adjustment mechanism", also known as "best-seller clause", aimed at rebalancing the originally agreed remuneration with the economic value stemming from the commercial exploitation of the rights over time.[58] Article 20 CDSMD harmonizes provisions already existing in some Member States which, in some cases, led to redress the value towards authors and performers.[59] According to Art. 20 CDSMD, when a comparable applicable collective bargaining mechanism is not available, Member States shall empower authors and performers, or their representatives, to "claim additional, appropriate and fair remuneration […] when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances". Authors and performers are thus entitled to claim such remuneration from their contractual partner, or its successors in title. Such contractual protection, which can be categorized within the contractual justice framework, applies when the initial remuneration is "clearly"[60] disproportionally low compared with the

[52] European Copyright Society (2020), p. 18: "This extension of the obligation beyond the contractual realm of the first transfer/licence is remarkable and could be considered as a genuine protection of authors/performers".

[53] Article 19(2) CDSMD.

[54] Article 19(3) CDSMD.

[55] Article 19(4) CDSMD. This, however, can lead to interpretative conflicts and litigation. *See*, *e.g.*, in Germany, German Federal Supreme Court, 10 May 2021, Case I ZR 145/11, 2012 GRUR 1248, BGH, 10.5.2021 – *Fluch der Karaibik*,

[56] *See* Romano (2019).

[57] Article 19(5) CDSMD.

[58] This mechanism does not apply to agreements concluded by CMOs and IMEs pursuant to Art. 20(2) CDSMD.

[59] *See*, *e.g.*, in Germany, German Federal Supreme Court, 22 September 2011, Case I ZR 127/10, 565 WRP 2012 – *Das Boot*; German Federal Supreme Court, 20 February 2020, Case I ZR 176/18, 2020 WRP 591 – *Das Boot II*; German Federal Supreme Court, 10 May 2012, Case I ZR 145/11, 2012 GRUR 1248 – *Fluch der Karibik*; Berlin Court of Appeal, 1 June 2016 Case 24 U 25/15, 2016 GRUR Int. 1072 – *Fluch der Karibik II*. *See also* Paramythiotis (2021), pp. 87–88.

[60] *See* Rec. 78, second sentence, CDSMD.

revenues stemming from the subsequent exploitation of the rights, which can happen especially in long duration contracts where the future success of the work can be underestimated. The assessment of the lack of proportionality should result from a global assessment, which should take into account all the relevant revenues, "the specific circumstances of each case",[61] including the contribution of the author or performer and the sector-specific circumstances, and "whether the contract is based on a collective bargaining agreement"[62]. The CDSMD, however, leaves Member States free to determine the threshold of the disproportion between the remuneration initially agreed and the subsequent revenues. Moreover, albeit the right to claim the further remuneration is not contractually overridable, the CDSMD leaves open to private autonomy the negotiation of the content of the "additional, appropriate and fair remuneration", without mentioning, for example, the need for a direct proportionality of such additional remuneration. Where an agreement on the adjustment of the remuneration is not reached, "the author or performer should be entitled to bring a claim before a court or other competent authority".[63] In any case, the effect of this provision should be that authors and performers receive an appropriate and proportionate remuneration in accordance with the principle set out in Art. 18 CDSMD.

Article 21 CDSMD, trying to overcome the hesitancy of authors and performers to enforce their rights before courts,[64] requires Member States to implement voluntary, alternative dispute resolution procedures addressing claims related to obligations of transparency and the contract adjustment mechanism, which representative organizations of authors and performers may initiate under specific request. Member States are free to decide the public or the private nature of such body.[65] The *ratio* is clearly related to the need to help the weaker contractual parties to enforce their rights, by simplifying the access to justice and by overcoming cost-related issues.[66]

Article 22 CDSMD secures a right to revoke "in whole or in part the license or the transfer of rights" in case of "a lack of exploitation".[67] Such right is aimed at ensuring that authors and performers are not bound by contracts where the counterparty does not respect the exploitation obligations, with negative effects both on the opportunity for creators to benefit from remuneration and on the dissemination (and access) of works and other subject matter within society. Also in this case, Member States are free to issue within the respective national legal orders "specific provisions for the revocation mechanism", by taking into account "the specificities of the different sectors and the different types of works and

[61] *See* Rec. 78, fourth sentence, CDSMD.

[62] *See* Rec. 78, fourth sentence, CDSMD.

[63] Rec. 78 CDSMD.

[64] *See infra* 3.1.

[65] *See* Rec. 79 CDSMD.

[66] The future implementation of an independent EU Copyright institution tasked with ADR powers could be an efficient way to secure a fair balance of interest and the just remuneration for creators, in particular in the digital environment. *See*, in this sense, Geiger and Mangal (2022).

[67] Article 22(1) CDSMD.

performances", the "relative importance of the individual contributions" and "the legitimate interests of all authors and performers affected" for multi-authors or multi-performers productions,[68] or the most appropriate and reasonable time-frame for the exercise of the right.[69] Member States may also provide that authors or performers can opt to "terminate the exclusivity of the contract instead of revoking the license or transfer of the rights"[70] or that any contractual derogation is "enforceable only if it is based on a collective bargaining agreement".[71] The CDSMD, moreover, does not define the circumstances to determine the "lack of exploitation", merely excluding the application of the mechanism "if the lack of exploitation is predominantly due to circumstances that the author or the performer can reasonably be expected to remedy".[72] Beyond the hypothesis of lack of exploitation *tout court* mentioned by Rec. 80 CDSMD, indeed, there may be plenty of other situations where the exploitation may be much more limited than the contractual obligations and where interpretative issues about the application of the revocation mechanisms may arise.

Finally, another provision aimed at securing fair remuneration for authors stems from Art. 15(5) CDSMD.[73] Indeed, it obliges Member States to "provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers". This provision was introduced in the final stages of the legislative process as a result of a compromise aimed at limiting the risk of a reduced income for authors in face of the creation of a new right for press publishers.[74] Also in this case, the CDSMD does not define the meaning of "appropriate share", nor clarifies the link with Arts. 18–22 CDSMD or specifies the mechanisms to implement such share. Recital 59 CDSMD merely states that the provision is "without prejudice to national laws on ownership or exercise of rights in the context of employment contracts, provided that such laws are in compliance with Union law".

3 An Effective Implementation of the Fair Remuneration Rationale

3.1 The Weaknesses of Standalone Contractual Protections

The CDSMD creates a model of variable geometry that leaves room for national convergences and divergences around a common core of harmonized rules to secure

[68] Article 22(2)(1) CDSMD.

[69] *See* Art. 22(1) and (3) CDSMD.

[70] Article 22(2)(3) CDSMD.

[71] Article 22(5) CDSMD.

[72] Article 22(4) CDSMD.

[73] *See*, *ex multis*, for a comment of Art. 15 CDSMD, Scalzini (2021a); Ricolfi (2019); Geiger et al. (2017).

[74] *See* Furgał (2021), p. 891: "This guarantee was crucial for convincing initially hesitant journalists' organizations to back the press publishers' right".

fair remuneration to authors and performers within exploitation contracts, which is intended to receive throughout Europe uniform interpretation and application thanks to the future intervention of the Court of Justice of the European Union (CJEU).[75]

However, our assumption is that by providing a common one-size-fits-all ground for copyright contracts, the CDSMD misses to address more general weaknesses of copyright contract law,[76] particularly within certain sectors.[77] First, there are no provisions relating explicitly to the negotiation phase. Here, authors and performers, in particular those who are at the beginning of their careers or who have not yet experienced great commercial success, could encounter difficulties, limiting the possibilities of obtaining appropriate and proportionate remuneration from the very beginning. Second, in the enforcement phase, due to the costs and length of proceedings, the heavy burden of proof concerning the insufficiency of the agreed remuneration and the fear of retaliation and "blacklisting" (i.e., greater difficulty, if not impossibility, of finding a counterparty willing to enter in a new agreement after a dispute),[78] the majority of authors and performers might not always be able to enforce their rights within their individual contractual relationships, underling a problem of access to justice. In other words, these envisaged measures risk being ineffective if a relevant part of authors or performers is not willing to activate them.

Even apart from this, given the minimum harmonization, the incisiveness of the new contractual measures depends heavily on the national implementations. The CDSMD leaves unsettled questions for Member States on the available mechanisms to implement Art. 18 CDSMD, by also taking into account the principle of contractual freedom and a fair balance of rights and interest. Indeed, the CDSMD has opted for a flexible provision that allows for different degrees of national protection.[79]

[75] It has been defined also as "EU *acquis* 'contractual corpus'" by Xalabarder (2020a), p. 8.

[76] *See* European Copyright Society (2020): "the regulation of contracts is no magic solution" (at p. 3) and "all the rules contained in Article 18-22 of the CDSM Directive grant an *ex post* protection, that is, they regulate contracts that have already neem concluded, rather than seeking to control either the negotiation phase or the content of an exploitation contract (with the exception of the principle of fair remuneration and related rules […]). The harmonisation brough by the CDSM Directive is incomplete"; Dusollier (2020), p. 1021: "National contractual protections, where they exist, ensure a better position of creators in negotiating their contracts, but sometimes fail to support them through their execution and enforcement, and mostly, do not help much in terms of ensuring an appropriate level of remuneration"; Xalabarder (2020b), p. 26: "evidence shows that general principles of fair remuneration and contract rules play a very limited role in securing remuneration for authors"; Dusollier et al. (2014), p. 13: "The existing contractual protection of authors […] appears not to be sufficient or effective to secure fair remuneration to authors or address some unfair contractual provisions". See also, in this sense, Senftleben and Izyumenko (2024), pp. 23–25: "the effectiveness of these mechanisms may remain limited in practice"; Hugenholtz (2022), p. 476: "Except for the few "star" authors and performers that do have market power, most creators are afraid of compromising their fragile relationships with publishers, producers, broadcasters and other exploiters, or even of being "blacklisted"".

[77] Gompel et al. (2015), p. 51: "authors and performers are not always able to negotiate different types of remuneration per line of exploitation, including digital media […] and have so far been unsuccessful in trying to reap the benefits of digital media"; Dusollier (2020), p. 1022: "some issues particularly related to digital exploitation could have been purposefully addressed".

[78] *See* Rec. 79, first sentence, CDSMD.

[79] *See*, for an analysis of the origin of the provision, Aguilar (2019).

Yet, Art. 19 CDSMD, for instance, does not establish specific sanctions for the non-compliance. Member States, therefore, should use their freedom to provide for further measures to ensure transparency for authors and performers.[80]

Also the effectiveness of Art. 20 CDSMD might vary considerably according to the Member States' choices and the room left to private autonomy. Article 20 CDSMD leaves open the determination of the disproportion and of the additional remuneration. National experiences show that legislators may also decide to restrict the exercise of such right.[81] Moreover, the contract adjustment might not be particularly efficient for works or performances created with the contribution of multiple parties. Even a minimum harmonization of such a mechanism may serve as an incentive for more balanced negotiations from the beginning of the relationships between authors, artists and cultural businesses, in order to handle contingencies and to prevent disputes on the fairness of the quantum of remuneration. However, its exercise may be excessively burdensome for authors and performers, even with the help of their representatives, resulting *de facto* in an unenforceable provision.[82] This mechanism "can be seen as a last "safeguard" when everything else has failed or does not apply",[83] but "it should not be the only solution and, certainly, not the only 'last' one",[84] as there may, and should, be other additional "contractual adjustments".[85]

Even Art. 21 CDSMD might be "toothless" in order to secure fair remuneration, if the procedures are not used for fear of retaliation and blacklisting.

Concerning Art. 22 CDSMD, it may be difficult without legislative guidance to establish the criteria that trigger a reasonable "lack of exploitation". Only some national laws take into consideration other elements beyond the lack of the

[80] *See*, *e.g.*, in Italy, Art. 110^{quarter} Italian Copyright Act, introduced by Legislative Decreee 8 November 2021, No. 177, encompass a wide range of information to be provided and shortened to six months the timeframe for the disclosure and empowers the Italian independent communication authority (AGCOM) to enforce the transparency provision though administrative fines. *See*, for a comment, Bossi and Ciani Sciolla (2022); in France, Art. L. 131-5-1 French Intellectual Property Code establishes that the modalities of the reporting should be established through collective negotiations (or by an administrative decree) or mandatorily within the clauses of the contract.

[81] *See* Art. 47 Spanish Copyright Act, modified by the Real Law Decree 24/2021 of 2 November 2021, which provides for a timeframe in which the author can exercise the right. *See* also Xalabarder (2020a), p. 148, who mentions that previously this rule was applicable only to the remunerations based on a lump sum.

[82] *See* Scalzini (2021b).

[83] Xalabarder (2020a), p. 150.

[84] Id.

[85] *See*, *e.g.*, in Spain, Art. 47 Spanish Copyright Act, modified by the Real Law Decree 24/2021 of 2 November 2021, which allows for a revision of the contract and in case of lack of agreement the possibility to claim the additional remuneration; in France, Art. L. 131-5 French Intellectual Property Code, modified by the Ordinance No. 2021-580 of 12 May 2021, which allows a possible revision of the contract too.

exploitation *tout court* (e.g., the number of copies sold; the refusal to reprint).[86] Moreover, this provision should be binding and not overridable by contract.[87]

In this context, Art. 18 CDSMD contributes to design a framework where the need to find effective remuneration strategies for creators is gaining momentum as a substantive principle in copyright law. The realization of this purpose appears possible only through a combination of several mechanisms and not just contractual protections.

3.2 The Prescriptive Scope of Art. 18 CDSMD and the Need for Other Mechanisms

Contrary to the recommendations of the European Parliament,[88] several Member States transposed Art. 18 CDSMD introducing only very limited amendments to their legislations.[89] This is not entirely surprising. The CDSMD provides for a minimum harmonization[90] and the actual prescriptive scope of Art. 18 CDSMD is rather vague.[91]

Article 18 CDSMD simply mentions that Member States are free to use generic "mechanisms" in its implementation. However, this doesn't mean that they enjoy unfettered freedom. Indeed, the exact extent of discretion in the implementation of a directive depends on the results to be attained.[92] In other words, Member States have an obligation to adopt in their national legal systems all the measures

[86] *See*, *e.g.,* Art. L.132-17-2 French Intellectual Property Code, concerning book publishing. *See* also Furgal (2021); Granieri (2019), p. 139.

[87] *See*, in Italy, Art. 110^septies^ Italian Copyright Act, according to which any agreement overriding this right is void, unless provided by a specific collective agreement; in Spain, Art. 48bis Spanish Copyright Act, according to which the right is unwaivable. *Cf.* Kretschmer et al. (2021), highlighting several criticalities and the necessity of further studies.

[88] European Parliament (2021), para. 15: "[The European Parliament regrets that] only a few Member States have seized the opportunity provided by Article 18 to implement appropriate remuneration mechanisms; urges the Member States to translate Article 18 of Directive (EU) 2019/790 into effective remuneration mechanisms".

[89] *See*, for a first report on the implementation, Lacourt et al. (2023), p. 39 ff., who however notes that: "While several countries have opted for a relatively literal transposition, some stand out for having implemented more detailed provisions for the protection of authors and performers. This has sometimes led to debate among industry players and, in some cases, legal action"; Carre et al. (2023), p. 40 ff.; Furgał (2022), p. 11 ff.

[90] Recital 83 CDSMD. The final wording of Art. 18 CDSMD takes into consideration the fact that Member States will have to harmonize the principle within their respective (different) domestic legal traditions, by taking also into account the sector-specific issues which can diverge from country to country.

[91] *See* Gotzen (2024), p. 202: "[most legislators] for the sake of precaution, were careful not to stay too far from the literal text of the Directive. The reason for this is, on the one hand, the desire to prevent any condemnation for an incorrect implementation, and, on the other hand, a reluctance to clarify unilaterally European provision that are often complicated or not well defined".

[92] Article 288(3) TFEU.

necessary to ensure that the directives are fully effective.[93] Otherwise, a text could be considered insufficiently transposed.[94]

The objective pursued through Art. 18 CDSMD is to ensure to all authors and performers, whether successful or not, fair revenues from the exploitation of their works and performances when they transfer or license their exclusive rights.[95] Considering the mentioned criticalities in the negotiation and enforcement phases, a *verbatim* transposition of the principle risks remaining a general policy statement.[96] At the same time, relying only on *ex post* contractual protective measures could not be sufficient.[97] Consequently, an effective implementation seems to imply additional mechanisms.[98] Several proposals have been made in this regard (e.g., clarifying the rights enforceable before courts;[99] a minimum threshold of remuneration for specific sectors, eventually determined through collective negotiations;[100] the creation[101] or the enhancement[102] of statutory remuneration rights).

[93] *See*, *ex multis*, CJEU, 10 April 1984, Case C-14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, EU:C:1984:153, para. 15.

[94] Against the recognition of the direct effect of Art. 18 CDSMD, it may be argued that this provision does not have an unconditional nature, since it does not allow the national Courts to sufficiently identify the amount of the appropriate and proportionate remuneration, nor the identity of the person on whom the obligation to pay rests. *See*, for a different position, arguing in favor of the direct effect of Art. 18 CDSMD, Xalabarder (2020b).

[95] *See* Rec. 3, seventh sentence, CDSMD. *See* also European Commission (2016), p. 134:

[96] *Cf.* Opinion AG Mancini, Case C-248/83, *Commission v. Germany*, Rep. 1459, p. 1465: "No provision of the Treaty or of secondary legislation expressly excludes implementation of a directive through constitutional rules. It is clear, however, that such rules must fulfil the requirements and conditions imposed by the Community measure with the same degree of effectiveness, certainty and clarity as would be possible with ordinary rules adopted *ad hoc*".

[97] *Cf.* Lucas-Schloetter (2017), p. 898: "Such a general fairness requirement regarding the remuneration of creative people should not […] be limited to a mere statement of general policy without any concrete and effective enforcement mechanism"; Schwope (2022), p. 95: "Article 20 DSMD remains an *ex post* mechanism. It appears that, considering the still existing structural imbalance in bargaining power, *ex ante* mechanisms which strive for mandatory appropriate remuneration from the beginning would likely be more effective".

[98] In support of this, it should be noted that the CDSMD intends to confer a right on individuals and to define a framework of reinforced protection for a weaker category in relation to stronger contractual parties. Consequently, the possibility of dispensing with a specific implementing measure, on the grounds that existing measures are deemed sufficient, should be appraised rigorously. *See* Opinion AG Tizzano, 23 January 2001, Case C-144/99, *Commission v. Netherlands*, Rep. I-3541, para. 18. *See also* CJEU, 19 September 1996, Case C-236/95, *Commission v. Greece*, Rep. I-4459, para. 13. *See*, in the same sense, Cogo (2022); Fabbio (2019); Lucas-Schloetter A (2017).

[99] *See*, *e.g.*, in Germany, Sec. 32 German Copyright Act; in the Netherlands, Arts. 25b–25h Dutch Copyright Act, which implemented a system of voluntary negotiations about common remuneration rules. For a comment *see* Senftleben (2018).

[100] *See*, *e.g.,* Arts. 33 and 36 Greek Copyright Act which establish fixed percentage of sector specific remuneration; *See* also Art. 25c(2) Dutch Copyright Act which allow the possibility for specific sector of an administrative determination of the level of fair remuneration for a specific period of time.

[101] *See* European Copyright Society (2020) and Xalabarder (2020b).

[102] *See* Art. 46[bis] Italian Copyright Act, which laced the words "fair compensation" with the words "appropriate and proportionate" compensation and enlarged the list of the beneficiaries.

In the absence of explicit indications in the text, it could be argued that is not possible to lay down an ultimate method for determining what constitutes uniform appropriate and proportionate remuneration pursuant to the CDSMD as it is for the Member States to determine, in their own territory, the most appropriate criteria.[103] Nevertheless, in order for Art. 18 CDSMD to be effective, the envisaged mechanisms seem to require at least certain characteristics.[104] First, they should embrace not only an *ex post* perspective, but also an *ex ante* one. Indeed, considering its general tenor, the provision does not seem confined to the period after the conclusion of the contract, but to adopt a wider perspective.[105] Second, they should be unwaivable. Article 18 CDSMD is not expressly safeguarded against contractual derogations by Art. 23(1) CDSMD. This is probably due to its nature as a matter of principle.[106] In any case, its implementing measures should be mandatory. Otherwise, the stronger party would generally impose their renunciation.[107] The reference to contractual freedom in Art. 18(2) CDSMD should not be used as a justification to eliminate the right to receive a fair remuneration, which should not be overridden by contract.[108] Third, they should operate independently from negotiation and enforcement by individual creators. Otherwise, it is likely that, especially in certain sectors, most authors or performers will not benefit from the protection.[109]

In this framework, a wider use of statutory remuneration rights does not seem to be only an option. On the contrary, it appears to be *one of the best ways*, next to

[103] *See*, in this sense, CJEU, 25 February 1999, Case C-131/97, *Annalisa Carbonari and others v. Università degli studi di Bologna and others*, EU:C:1999:98, para. 45; CJEU, 6 February 2003, Case C-245/00, SENA v. NOS, EU:C:2003:68, paras. 34 and 36.

[104] *Cf.* CJEU, 29 July 2019, Case C-469/17, *Funke Medien NRW v. Bundersrepublik Deutschland*, EU:C:2019:623, para. 58.

[105] *Cf.* in France, French CE, 25 November 2022, Case 454477, according to which a correct transposition of the CDSMD requires the remuneration to be "appropriate" from the beginning. *See* also Xalabarder (2020b), p. 8: "Art. 18 CDSM, instead, is mainly an *ex ante* mechanism […]. Article 18 CDSM serves as a 'beacon' to guide national legislators, offering the necessary flexibility to complete and to 'supplement' the national implementation of Arts. 19 to 22 CDSM"; Lucas-Scloetter (2017), p. 898: "it is the original contract that should in the first place *ex ante* provide for "appropriate" remuneration". *See*, for a contrary position, Rosati (2024), p. 6: "[Art. 18 CDSMD] does not confer a blanket mandate or impose ex ante obligations. Instead, it serves as an umbrella provision that ties together the subsequent Articles 19 to 23 CDSMD".

[106] *See* Xalabarder (2020b), p. 18: "[Art. 18 CDSMD] being a principle […], it does not need to be safeguarded by contractual override". *Cf.* CJEU, 9 February 2012, Case C-277/10, *Luksan v. van der Let*, EU:C:2012:65, para. 107: "European Union law precludes a provision of domestic law which allows the principal director of a cinematographic work to waive his right to fair compensation".

[107] *Cf.* European Copyright Society (2020), p. 140: "If the right to a fair remuneration is implemented by way of contract law, this should by definition be a provision that cannot be overridden by contract, or else it will have no effect, and Member States will not comply with Article 18".

[108] Dusollier (2020); Xalabarder (2020a, b); Scalzini (2021a).

[109] *Cf.* CJEU, 30 January 1985, Case C-143/83, *Commission v. Denmark*, EU:C:1985:34, para. 8, and CJEU, 28 October 1999, Case C-187/98, *Commission v. Greece*, EU:C:1999:535, para. 47: "The State guarantee must cover all cases where effective protection is not ensured by other means, for whatever reason, and in particular cases where the workers in question are not union members, where the sector in question is not covered by a collective agreement or where such an agreement does not fully guarantee the principle of equal pay".

those devised so far, which could really achieve the effectiveness of the principle of appropriate and proportionate remuneration of authors and performers, both within exploitation contracts[110] and beyond.[111] This seems especially true in the digital context.

4 A Wider Use of Remuneration Rights Within and Beyond the CDSMD

4.1 A Tentative Taxonomy

There is a wide discussion among scholars and policymakers on the approaches, beyond exclusivity, that are better suited to secure effective remuneration for the use of creative works.[112] Statutory remuneration rights are attracting increasing attention. While some negotiations are better suited within free market dynamics under the umbrella of exclusive rights, there may be settings where statutory remuneration rights might be preferable options both for securing fair remuneration, for the smoother functioning of the market, and (even) for fostering access and derivative creativity. Indeed, in some cases, they may be much more interesting financially both for authors and performers than contractual royalty payments, as – especially in the digital environment – the interest in obtaining an effective remuneration may outweigh the interest in securing the control of every use of the work or the subject matter.[113] They would contribute to the realization of the remuneration rationale while, at the same time, allowing access and a smooth circulation of the works, thus enhancing the acceptance of copyright norms.[114]

Statutory remuneration rights could be defined as "statutory entitlements providing holders of copyright or related rights with a claim of remuneration without the ability to authorize or prohibit the use of copyrighted works or subject-

[110] *See infra* 4.2 and 4.3. The same seems valid also in relation to Art. 15(5) CDSMD.

[111] *See infra* 4.3. *Cf.* Gotzen (2024), p. 210: "[with Art. 18 CDSMD] we find a new example of what Adolf Dietz once described as 'quasi-constitutional provisions' guaranteeing the raison d'être of copyright" citing Dietz (2006), pp. 1–9. *See also* Alvarez-Amezquita and Vallejo-Trujillo (2023), p. 159: "Perhaps, the connection between this principle and the fundamental rights of the author could help to build on this matter".

[112] *See* Lewinski (2016); Liu and Hilty (2017).

[113] Many scholars have underlined the benefits of statutory remuneration rights, *see* Geiger (2017a); Geiger (2017b); Ginsburg (2014), p. 1446; Frosio (2019). *See* also AEPO-ARTIS (2018), pp. 8–9: "Due to these commercial realities, very few performers' CMOs […] are able to exercise exclusive rights on behalf of performers. […] collection made by performers' CMOs is mostly in respect of remuneration rights". It was also recognized by several national court decisions that remuneration rights can be in certain situations more beneficial for creators then the exclusive rights. *See infra* 4.4.

[114] *Cf.*, discussing on the right to research, Geiger and Jütte (2023), p. 13: "[The two paragraph of Art. 17 UDHR] can be read to be contradictory, the first guaranteeing free access to productions of the cultural, scientific, and artistic domain, and the second guaranteeing the authors of these productions rewards in terms of protection and remuneration for their efforts, and effective control over their use. […] Instead, intellectual property rights can also be seen as a "balanced framework" that reconciles copyright's natural law and utilitarian foundations".

matter covered by related rights”.[115] In a nutshell, the use is “permitted-but-paid”.[116]

Although there seems to be an increasing scholarly convergence in considering remuneration rights under the same umbrella, at least from a teleological perspective, there is not a universal consensus on their classification. Such rights are encompassed by a broad spectrum of techniques and terminologies that may also vary according to the international, regional, and national sources and to the different legal national traditions and scholarships.[117]

For the sake of an analysis functional to this article, a main distinction can be drawn on their relationship with exclusive rights:[118] (i) remuneration rights coexisting and overlapping with exclusive rights “for the same uses” (“residual remuneration rights”, aimed to secure residual remuneration upon the transfer of economic rights);[119] (ii) remuneration rights created outside the scope of exclusive rights (i.e., without corresponding exclusive rights or as an alternative to the provision of exclusive rights) (“other remuneration rights *per se*”);[120] and (iii) a remuneration right created through exceptions and limitations to exclusive rights (“limitation-based remuneration rights”).[121]

Further classifications could consider the quantification of the payment due (e.g., harm or market value)[122] or its redistribution (e.g., to authors, performers, or other subjects).[123] These variations mirror the different policy objectives pursuable with

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[115] *See* Geiger and Bulayenko (2022), p. 10.

[116] *See* Ginsburg (2014).

[117] In many cases, they are generally referred to by terms as “remuneration right”, “compulsory license”, “legal license”, “obligatory license”, “non-voluntary license”, “statutory license”, “liability rule” and introduced by provisions employing, more or less indiscriminately, terms such as “fair”, “equitable”, “appropriate”, “remuneration”, “proportionate” and “compensation”, “indemnity”, “remuneration”.

[118] *See* Geiger and Bulacenko (2022), p. 10, with a broader discussion on the policy options available to policymakers in devising new remuneration rights. Such distinctions recall other scholarly classifications, but are slightly different from them. *See*, for other classifications, Ficsor (2006), p. 42; Xalabarder (2018), p. 46; Xalabarder (2020a), p. 24; Riis (2020), pp. 447–449; Hugenholtz (2023).

[119] *See*, *e.g.*, and Art. 5(1) RLD, for rental; Art. 3(2b) Term Directive, on the right of performers to obtain an annual supplementary remuneration from the phonogram producer for each year immediately following the 50th year after the publication or communication to the public; Art. 12(3) Beijing Treaty, on equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public.

[120] *See*, *e.g.*, Art. 1 Directive 2001/84/EC and Art. 14ter Berne Convention, on resale right; Art. 8(2) RLD, Art. 12 Rome Convention and Art. 15(1) WIPO Performances and Phonograms Treaty, for broadcasting or any communication to the public of a phonogram; Art. 14(4) TRIPS Agreement (concerning computer programs and cinematographic works), Art. 7(1) WCT (concerning computer programs, cinematographic works and works embodied in phonograms), Arts. 9(1) and 13(1) WIPO Performances and Phonograms Treaty (“WPPT”) (concerning phonograms), for rental. *See* also the remuneration for the use of works of expressions of folklore and for use of public domain works provided by certain national legislation.

[121] *See*, *e.g.*, Art. 5(2)(a) InfoSoc Directive, on reprography; Art. 5(2)(b) InfoSoc Directive, on private copying; Art. 5(2)(e) InfoSoc Directive, on broadcast by social institution.

[122] *See* Riis (2020).

[123] *See* Xalabarder (2018).

remuneration rights, which oscillate between rewarding the entitled subjects or compensating them for a loss.[124]

The following paragraphs investigates some possibilities to implement different types of remuneration rights (residual remuneration rights (4.2); other remuneration rights *per se* (4.3); and limitation-based remuneration rights (4.4)), within and beyond the CDSMD.

4.2 Residual Remuneration Rights

4.2.1 Residual Remuneration Rights as Implementing Mechanisms of Art. 18 CDSMD

A possible solution to overcome some of the weaknesses of contractual protections would be to devise residual remuneration rights for authors and performers. Such rights do not interfere with the transfer or license of exclusive rights. Indeed, authors or performers retain the right to control the exploitation, but the circulation of the exclusive right triggers a remuneration entitlement. The exploiter pays the remuneration directly, regardless of contractual provisions. Their main rationale is the redistribution of revenues generated in favor of authors and performers.[125]

Residual remuneration rights can be especially useful when a multitude of different exclusive rights overlap for the same work or performance, such as in the audiovisual or musical sector. They may prevent, after their initiation, the transaction costs of revising individual contracts and of negotiating additional remunerations, providing market stability.[126]

These are some of the reasons why residual remuneration rights have been proposed on several occasions. In particular, the European Commission suggested them in relation to the making available right.[127] Moreover, many responses to the

[124] Often there are blurred lines and grey zones among the concepts of fair compensation and fair/equitable remuneration. For this reason, the conceptual distinction between fair/equitable compensation and fair remuneration has been criticized by many scholars, who argue that on the teleological level the general paradigm of "remuneration" is more appropriate as the final policy objective should be to remunerate and reward creators for the use of their works (*see*, *e.g.*, Geiger (2017a, b)). Other scholars (Riis (2020)) criticized such distinction because of the blurred criteria existing in current legislation and in practice to calculate the remuneration, which should be based mostly on market value other than on harm-based considerations. This debate is particularly heated for the "fair compensation" system (in the form, *e.g.*, of the levy system) built for the private copying exception. *See* also Mansani (2018).

[125] *See* Geiger and Bulayenko (2022), pp. 430–431: "It is likely that the grant of remuneration rights to authors and performers covering the same uses does not lead to an increase of users' willingness or resources available for payment".

[126] *Cf.* Xalabarder (2020a), p. 142: "[Residual remuneration rights] avoid the need to renegotiate pre-existing contracts, securing fair remuneration […]".

[127] European Commission (2011), p. 16: "It could be argued that authors have no economic benefit from the online exploitation of their works if no proportional remuneration is passed on a per use basis. To remedy this, one option would be the introduction of an unwaivable right to remuneration for their 'making available' right managed, compulsorily, on a collective basis. […] It could be argued that performers should equally be entitled, on a harmonized basis, to an unwaivable right to remuneration from which they would benefit even after they have transferred their exclusive right of making available".

Public Consultation on the Review of the EU Copyright Rules cited them.[128] Even if not mentioned in the final text of the CDSMD, a previous version approved by the European Parliament included remuneration rights.[129] In addition, many scholars and organizations supported them, particularly within the audiovisual sector.[130]

Residual remuneration rights, in particular if unwaivable, non-transferable and managed by CMOs, may be "other mechanisms" able to secure the effectiveness of Art. 18 CDSMD,[131] especially in digital settings. For this purpose, their concrete formulation should comply with EU law and take into account the principle of freedom of contract and a fair balance of rights and interests.[132]

In the following paragraphs, national experiences and recent referrals to the CJEU will help to reflect on these aspects.

4.2.2 The Belgian Referral Concerning Exploitation on Online Platforms

Residual remuneration rights at the EU level are based on Art. 5 Rental and Lending Directive (RLD) for the rental of phonograms and films[133] and Art. 3(2b) Term Directive on the annual supplementary remuneration for performers. At the international level, Art. 12(3) Beijing Treaty grants the possibility to introduce a residual remuneration right for any use of a performance. After the CDSMD, some Member States introduced new residual remuneration rights.[134] Others, already had

[128] European Commission (2014), pp. 77–82. In particular, CMOs strongly supported such mechanisms. Authors and performers did the same, but, in some cases, feared that they will see the value of their exclusive rights reduced and their bargaining power weakened. Intermediaries raised concerns about the impact on cross-border services and anticipated a reduction in the value of exclusive rights, as well as an increase in the role of CMOs and their administrative costs.

[129] *See* Amendment 80, Report on the proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)), Committee on Legal Affairs (JURI). For a comment *see* Xalabarder (2020a), pp. 11–12.

[130] *See*, in particular, Xalabarder (2018) and Xalabarder (2020b) proposing an unwaivable and inalienable right for audiovisual authors to receive equitable remuneration for any acts of exploitation of their works, under collective management, and paid directly by the users; CISAC (2017), pp. 5–6, SAA (2017), SAA (2015), pp. 38–42 and SAA (2011), p. 26, proposing a right to remuneration for the making available right of audiovisual works.

[131] *Cf.* Riis (2020), p. 448: "[The CDSMD] includes a contemporary example of a residual remuneration right" and "[Art. 18 CDSMD] resembles Ar. 5(1) of the RLR Directive and illustrates the (perhaps growing) need for rules that redress the uneven bargaining powers in many copyright markets and which, in particular, ensure authors and performers a minimum remuneration".

[132] *See supra* 2.1.

[133] *See* von Lewinski (2012), pp. 120–127, on the origin and the potential of this model. *See* also Xalabarder (2020b), p. 43: "in practice (because of the leeway left to Member States under Art. 5 RLD), the resulting picture is far from harmonized and has failed to secure fair remuneration for Authors and Performers".

[134] *See*, *e.g.*, Belgium, Arts. XI.228/4, for uses on OCSS, and XI.228/11 Code of Economic Law, for uses on streaming services; Germany, S. 4(3) OCSSPs Act, for uses on OCSS; Slovenia, Arts. 76(6), for uses on OCSS Slovenian Copyright Act; Romania, Art. 44(1^1) Romanian Copyright Act, for any use; Lithuania.

some in their legislations.[135] Their formulation and scope are extremely diverse (e.g., for any or specific acts of exploitation; for all or specific works; for authors or performers; waivable or unwaivable).

The Belgian experience is of particular interest. Indeed, this original transposition marks a major step forward in the online exploitation of works and performances. It resulted in a constitutional litigation and a pending referral to the CJEU. The outcome of these proceedings is likely to affect the development of similar mechanisms in the entire EU.

In August 2022, the Belgian legislature transposed the CDSMD amending the Belgian Code of Economic Law.[136] Two new residual remuneration rights for authors and performers were introduced. The first, pursuant to Art. XI.228/4,[137] is retained when authors and performers transfer or license their rights of communication to the public by online content-sharing service providers ("OCSSPs").[138] The second, pursuant to Art. XI.228/11,[139] concerns specifically audio and audiovisual works and it is retained when authors or performers transfer

[135] *See*, *e.g.*, Italy, Arts. 46bis(2) and 84 Italian Copyright Act, for every exploitation of films respectively for authors and performers; Spain, Arts. 88, 90(4),(6) and (7), 108(3) and (6) Spanish Copyright Act, for video on demand services; Germany, Art. 20b(2) German Copyright Act, for retransmission of audio recordings or films; Poland, Art. 70(3) Polish Copyright Act, for broadcasting or other means of public presentation of works.

[136] *See* Belgian Law No. 2022015053 of 19 June 2022, https://www.ejustice.just.fgov.be/eli/loi/2022/06/19/2022015053/justel. All the preparatory documents cited below are available at: https://www.lachambre.be/kvvcr/showpage.cfm?section=flwb&language=fr&cfm=/site/wwwcfm/flwb/flwbn.cfm?dossierID=2608&legislat=55&inst=K.

[137] Introduced by Art. 54 Law No. 2022015053 of 19 June 2022.

[138] Article I.18(1) Belgian Code of Economic Law and Art. 1(1)(b) Directive (EU) 2015/1535 defines "Information Society Service" ("ISS") as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". Article XI.228/2 Belgian Code of Economic Law and Art. 2(1)(6) CDSMD defines "OCSSP" as "a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organizes and promotes for profit-making purposes. Providers of services, such as not-for-profit online encyclopedias, not-for profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to business cloud services and cloud services that allow users to upload content for their own use" are not included. Article XI.228/3(1) Belgian Code of Economic Law and Art. 17(1) provides that an OCSSP performs an act of communication to the public "when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users".

[139] Introduced by Art. 62 Law No. 2022015053 of 19 June 2022.

or license their rights of communication to the public by certain information society service providers (here referred to as "streaming services providers")[140] to producers or editors.[141] The new mechanisms are parallel. The first envisages "Art. 17 CDSMD uses" (e.g., YouTube, but also Facebook, Instagram or TikTok),[142] and the second envisages what is commonly intended with "streaming" (e.g., Spotify, Netflix, Amazon Prime Video, or Disney+). Both rights are non-transferable, non-waivable, and subject to mandatory collective management.[143]

Discussions about their introduction in Belgium emerged already during the first consultations in 2020, revealing conflicting positions between the stakeholders.[144] In 2021, the Belgian federal government asked to the European Commission if the introduction of such mechanisms was compatible with the CDSMD. The Commissioner replied first negatively in two non-binding letters, insisting on the full harmonization provided by Art. 17 CDSMD which would not allow Member States to introduce additional copyright rules in the harmonized area, even on the basis of Art. 18 CDSMD.[145] However, in March 2022, some members of the

[140] Article XI.228/10 Belgian Code of Economic Law defines these as ISS providers "whose principal purpose of one of principal purposes is offering for profit a substantia quantity of audio and/or audiovisual works protected by copyright or related rights, and where: 1° users have, for recurring remuneration in money or without such remuneration, the right of access to the audio and/or audiovisual works offered; 2° users cannot acquire a permanent reproduction of the work consulted; 3° users have access to the audio and/or audiovisual works offered from the place and at the time individually chosen by them; and 4° the service provider has editorial responsibility for the offer and organization of this service, including the organization, classification and promotion of the audio and/or audiovisual works". For a commentary *see* Amendments DOC 55 2608/005 of 23 May 2022, pp. 5–8, according to which consultation against individual payment and linear diffusion are not covered. Moreover, it points out that "streaming" describes a technique according to which the content does not need to be previously downloaded or uploaded before it can be viewed. There is not a homologous definition in EU law. However, *see* Recital 62, second sentence, CDSMD, according to which the definition of OCSSPs compete with online audio and video streaming services for the same audience.

[141] However, nowadays many authors and performers do not pass through traditional publishers and producers. *Cf.* Geiger and Bulayenko (2022), p. 437: "Granting of a right to an equitable remuneration only to creators who transferred their exclusive rights, but not to those who preferred to keep them (e.g., self-publishing and self-recording), does not seem to have a solid legal or economic public or policy rationale".

[142] *Cf.*, concerning audiovisual works, Spain, Art. 90 Spanish Copyright Act; Italy, Art. 46bis Italian Copyright Act; Estonia, Art. 14.6 Estonian Copyright Act; Germany, Arts. 20b(2) and 20d(2) German Copyright Act; Slovenia, Art. 107(4) and (5) Slovenian Copyright Act; Poland, Art. 70 Polish Copyright Act; The Netherlands, Art. 45d Dutch Copyright Act.

[143] Unless, only in the case of the second right, a collective agreement is applicable. *See* Law Proposal No. 552608/001, p. 91: "[mandatory collective management] has as purpose, on the one hand, facilitate the valuation of the remuneration right of authors and performers and, on the other hand, to facilitate the payment of the remuneration by the party liable by providing a single point of contact".

[144] Opinion of the Belgian Intellectual Property Council of 19 June 2020, https://economie.fgov.be/sites/default/files/Files/Intellectual-property/Avis%20Conseils%20Propri%C3%A9t%C3%A9%20intellectuelle/Avis-CPI-19062020.pdf, pp. 76–77.

[145] *See* the letters from the European Commission to the Belgian government of 6 October 2021 and 20 December 2021, as transcribed in Amendments DOC 55 No. 2608/002 of 4 May 2022, pp. 4–5, Report of the first reading DOC 55 2608/003 of 13 May 2022, p. 23, and Amendments filed in plenary session DOC 55 2608/008 of 16 June 2022, pp. 2–3.

European Parliament asked again for clarifications from the European Commission regarding the implementation of the CDSMD through remuneration rights.[146] On this occasion, the Commissioner replied that, in principle, Member States could transpose Art. 18 CDSMD through an unwaivable remuneration right, without taking a position on individual national implementations.[147]

Tensions continued during the legislative process.[148] Amendments aimed at suppressing the introduction of the new remuneration right for the communication to the public by OCSSPs were filed, insisting on the lack of legal basis, on the fact that an incorrect transposition would expose Belgium to claims for compensations from platforms and on other arguments.[149] During the first lecture, other issues were raised, but the amendments were rejected. The government acknowledged the doubts expressed by the European Commission, but insisted that "there is a legal basis for this choice, Art. 18 CDSMD", "this mechanism is the only capable of guaranteeing appropriate remuneration" and "this choice places artists in a strong position during negotiations, which direct negotiation cannot guarantee today".[150]

Subsequently, some parliamentarians also proposed the residual remuneration right for streaming. The reason was notably to remedy to the difference in treatment between platforms.[151] It was included during the second reading.[152] At the end of the legislative process, during the plenary session, the likelihood of a litigation before the Constitutional Court or the CJEU was emphasized,[153] and amendments

[146] Parliamentary question No. E-001255/2022 of 23 March 2022 by Georgoulis A, Heide H, Slabakov A and Del Blanco IG, Implementing Directive (EU) 2019/790 by means of additional non-waivable remuneration rights, https://www.europarl.europa.eu/doceo/document/E-9-2022-001255_EN.html.

[147] Answer given by Mr Breton on Behalf of the Commission of 20 July 2022, https://www.europarl.europa.eu/doceo/document/E-9-2022-001255-ASW_EN.html.

[148] Law Proposal DOC 55 2608/001 of 5 April 2022.

[149] Amendments DOC 55 No. 2608/002 of 4 May 2022, amendment 2, pp. 4–5, and amendment 3, pp. 6–7. *See*, *e.g.*, the multiplication of the number of intermediaries; the weakening of authors and performers in negotiations; the unfair competition with CMOs in other Member States; the necessity of include the mechanisms in a broader intervention improving the status of authors and performers.

[150] Report of the first reading DOC 55 2608/003 of 13 May 2022, pp. 22–34. In particular, arguments against were: how to determine the extent of diffusion; how to distinguish between creators who have assigned the rights and those who have not; the effects on existing contracts; the different functioning between sectors; the greater benefits for popular creators linked to the erosion of producer's ability to invest; the burden of risk on creators; the presence of non-affiliated creators. *See* also the text adopted after the first vote DOC 55 2698/004 of 13 May 2022.

[151] Amendments DOC 55 2608/005 of 23 May 2022, amendments 4–6.

[152] Report of the second reading DOC 55 2608/006 of 3 June 2022. Some arguments in favor were: the right to negotiate is meaningless when the balance of power between the parties is disproportionate; the existence of a tradition of compulsory collective management. Some arguments against were: the uncertainty of the concept of editorial responsibility and ISS providers; the absence of stakeholder consultation and impact assessment; the presence of hybrid offers (sale, rental, streaming) on the same platform.

[153] Report of the Discussion in Plenary Session CRIV 55 PLEN 186 of 16 June 2022, pp. 37–61.

for the suppression of the new remuneration rights were proposed again.[154] Nevertheless, these amendments did not find consensus.[155]

In January 2023, the new provisions were challenged before the Belgian Constitutional Court with five actions for annulment filed by major cultural enterprises and digital distributors. They alleged several EU law and fundamental rights violations and demanded a referral to the CJEU.[156] Some claimants even mentioned the eventuality of making their services inaccessible from Belgium.[157]

This kind of litigation is not entirely new in Belgium. Already in 2016, the Belgian Constitutional Court was asked to rule on another remuneration right subject to collective management. It is retained when authors and performers transfer or license their exclusive rights of cable retransmission to producers of audiovisual works.[158] This residual remuneration right was introduced in Belgium following an EU Directive which does not expressly provide it.[159] The Court dismissed the action for annulment, validating the objective of ensuring a minimum remuneration for authors and performers.[160] Although solicited by the claimants, no referral to the CJEU was deemed necessary.

On the contrary, in September 2024, the Court referred 13 questions to the CJEU.[161] In particular, it questioned the qualification of the new provisions as "technical regulations"[162] requiring a prior notification to the European Commis-

[154] Amendments filed in plenary session DOC 55 2608/008 of 16 June 2022. Moreover, concerns related to the risk of suppression of investment in local talent, the relocation of brands to other territories and the costs of collective management were highlighted.

[155] Report of the Vote in Plenary Session CRIV 55 PLEN 187 of 16 June 2022, pp. 17–18. *See* also Text adopted DOC 55 2608/009 of 16 June 2022.

[156] In particular, Arts. 10 (equality) and 11 (non-discrimination) Belgian Constitution, in combination with Art. 5(1) Directive (EU) 2015/1535, Arts. 17 and 18 CDSMD, Arts. 10 and 56 TFUE, Arts. 16, 20, 21 and 52(1) EU Charter of Fundamental Rights, Arts. 3 and 5(3) InfoSoc Directive. In addition, also Arts. XI.216/1 and XI.216/2 of Belgian Code of Economic Law, introduced by Arts. 38 and 39 of Law No. 2022015053 of 19 June 2022, concerning the new related right for press publishers were challenged.

[157] Belgian Constitutional Court of 26 September 2024, Case No. 98/2024, ECLI:BE:GHCC:2024:ARR.098, para. A.43.1, second part. *Cf.* Cerri (2023) reporting that in 2023 Spotify threatened ceasing its operation in Uruguay due to the introduction of a remuneration right. At the same time also some scholars raised doubts about the compatibility of these provisions, both in relation to the remuneration rights themselves and their mandatory collective management. *See* Rosati (2024).

[158] Article XI.225 Belgian Code of Economic Law.

[159] Directive 93/83/EEC.

[160] Belgian Constitutional Court of 13 October 2016, Case No. 128/2016, ECLI:BE:GHCC:2016:ARR.128, available (in French) at: https://www.const-court.be/public/f/2016/2016-128f.pdf.

[161] Belgian Constitutional Court of 26 September 2024, Case No. 98/2024, BE:GHCC:2024:ARR.098, available (in French) at: https://www.const-court.be/public/f/2024/2024-098f.pdf. *See*, for some early comments, summaries and translations, Dusollier (2025); Dusollier (2024), p. 36; Senftleben and Izyumenko (2024), pp. 30–35; Izyumenko (2024); Kyrylenko (2024); Vanbrabant (2023). CJEU, pending Case C-663/24, filed on 9 October 2024. *See also* Cooke (2024) and FLIF (2024) for some reactions from the stakeholders.

[162] Article 1(1)(f) Directive (EU) 2015/1535.

sion,[163] as well as the compatibility with Arts. 17[164] and 18[165] CDSMD, Art. 56 TFEU (freedom to provide services),[166] Art. 16 (freedom to conduct a business), eventually in conjunction with Art. 20 (equality) and 21 (non-discrimination) EUCFR,[167] and Arts. 3 (rights of communication and making available to the public) and 5(3) (exceptions and limitations) Directive 2001/29/EC ("InfoSoc Directive").[168]

4.2.3 Some Open Issues

In addition to minor procedural questions (e.g., whether the new remuneration rights can be qualified as "technical regulations"), the Belgian experience highlights several fundamental open issues concerning residual remuneration rights. An attempt is made hereafter to identify and discuss them.[169]

Firstly, the exact entitled subjects and sectors covered: In the Belgian example, no distinction is made between large and international providers and small and local ones. This aligns with the necessity of avoiding a fragmented approach and with the fact that, despite their size, providers remain structurally in a stronger contractual position than authors or performers. In any case, the characteristics of different providers could be considered by the CMOs in the concrete determination of the remuneration. Moreover, the debate concerned "traditional" works (e.g., songs and films). However, the residual remuneration rights seem to cover any kind of copyright-protected works and performances published on platforms.

Secondly, the exact territorial scope: This is particularly relevant due to the inherent cross-border nature of online content sharing and streaming services. The

[163] Questions 4 and 9. It was pacific that the contested provision was not notified in advance to the European Commission.

[164] Question 5. The claimants argue, in particular, that Art. 17 CDSMD in its entirety is a maximal harmonization measure, which precludes Member States from deviating from the defined standards.

[165] Questions 6 and 10. The claimants argue, in particular, that: (i) this provision cannot serve as a basis for the contested measures, as it relates only to contractual relations between the author or performer and the direct contractual counterpart and not in relation to a third party; (ii) the new remuneration rights are not necessary since a literal transposition (*i.e.*, XI.167/1 and XI.205/1 Belgian Code of Economic Law) is sufficient; (iii) Art. 18 CDSMD calls for uniform regulation within the EU; (iv) Art. 18 CDSMD precludes a legislation which results in a double payment; (v) the possibility of such remuneration rights was rejected during the legislative process of the CDSMD; and (vi) these measures are against the principle of contractual freedom.

[166] Questions 7 and 11. The claimants argue, in particular, that these rights complicate the current licensing practices, create a regime specific for Belgium that differs from the regimes put in place in other Member States and restrict the ability of the providers to conclude cross-border contracts, so that they constitute an unjustified restriction of this freedom.

[167] Questions 8 and 12. The claimants argue, in particular, an infringement, or a disproportionate restriction, of this freedom and an unjustified identity of treatment between international streaming platforms and local streaming platforms, even though these two categories are in different situations in terms of turnover and bargaining power.

[168] Question 13. The claimants argue, in particular, that the provisions unreasonably prejudice the exclusive nature of copyright. Moreover, the mandatory collective management of rights would prevent the individual exercise of exclusive rights.

[169] *See*, for another comment, Dusollier (2025).

lack of harmonization of remuneration rights across the EU and the resulting necessity to develop specific licensing mechanisms for single territories could entail unintended fragmentations of the internal market.[170] A restriction to the freedom to provide information society services could be recognized.[171] However, several justifications seem to be present. In particular, intellectual property is explicitly safeguarded.[172] Moreover, the protection of the interests of authors and performers could be assimilated to the protection of consumers or included in public policy.[173] Indeed, fair remuneration for authors and performers involves public interests that go beyond purely economic reasons. From an international private law perspective, remuneration rights should not be easily circumvented, such as by applying a different law.

Thirdly, the exact temporal scope: A newly introduced residual remuneration right would also apply in relation to contracts already in force.[174] This is likely to result in a decrease of contractual royalties. In this sense, the provision of a transitory period would not be particularly relevant. Even if more subjects are entitled to be paid directly for the same exploitation, residual remuneration rights do not seem to entail a double payment.[175] However, the question of the deductibility of the payments remains open.

Fourthly, the degree of harmonization of Art. 17 CDSMD and its intersections with Arts. 18 CDSMD: Nothing seems to suggest that Art. 17 CDSMD provides for a maximum harmonization.[176] In any case, the harmonization cannot extend to what the provision does not regulate. Article 17 CDSMD is silent on the remuneration and how it should be paid. This is a separate profile from the liability issue, that concerns whether the act is authorized or not. Article 18 CDSMD remains the reference norm on remuneration. Indeed, this provision has a broad scope and does not differentiate between analog and digital exploitation. In other words, Art. 18 CDSMD does not seem to be aimed solely at traditional producers and publishers, but also at OCCSPs and streaming providers. The introduction of a residual remuneration right would not transpose Art. 17 CDSMD, but Art. 18 CDSMD.

Fifthly, the compatibility with exclusive rights and, in general, the right of property: Unlike limitation-based remuneration rights, residual remuneration rights

[170] *See*, in this sense, Johansson (2024), p. 45: [the lack of harmonization] could result in unintended long-term consequences, whereby streaming remuneration operates differently in some Member States compared to others".

[171] *See* Art. 3(2) Directive 2001/31/EC, according to which Member States shall not restrict the freedom to provide information society services from another Member States.

[172] *See* Art. 3(3) Directive 2001/31/EC in conjunction with the Annex.

[173] *See* Art. 3(4) Directive 2001/31/EC. *Cf.* Signoretta (2023), comparing the position of authors and performers with the one of consumers.

[174] *Cf.* Opinion AG Szpunar, 24 October 2024, Case C-575/23, *FT and others v. ONB and others*, paras. 51–59 and 71, according to which Arts. 18–23 CDSMD should apply to acts of exploitation carried out as from 7 June 2021 even if regulated by contracts concluded before.

[175] *See*, in this sense, Dusollier (2025), pp. 47–48; Xalabarder (2020b), p. 36. *See* also, in Spain, *SAP Madrid* of 2 March 2015, No. 64/2015; STS of 12 July 2017, No. 1712/2017; *SAP Madrid* of 2 June 2020, No. 285/2020, which have confirmed this argument.

[176] *Cf.*, on the contrary, Recital 61 CDSMD, according to which Member States seem to have margin of discretion in the implementation.

do not affect or replace exclusive rights.[177] In the presence of residual remuneration rights, rightholders are still free to authorize or prohibit the exploitation of works and performances, deciding how and to whom licenses or transfers are granted. Consequently, the introduction of a residual remuneration right does not require an exceptions or limitation. Contractual royalties may decrease. However, this does not mean that the prerogatives of authors and performers are weakened, being safeguarded by the residual remuneration right. Its effect is merely balancing the distribution of the total amount paid among the various subjects.

Sixthly, the interpretation of Art. 18 CDSMD and, in particular, the liable subjects: Art. 18 CDSMD does not specify who must pay the remuneration. Nothing seems to preclude that this subject may be a sub-licensee or sub-transferee.[178] Consequently, residual remuneration rights, even if they go beyond contractual solutions in a strict sense, seem covered by this provision.

Seventhly, the introduction of mandatory collective management: Mandatory collective management does not seem explicitly forbidden by EU law or international conventions.[179] It makes the administration of residual remuneration rights easier, overcoming the necessity of negotiating with countless authors and performers. In any case, authors and performers have the right to rely on a CMO of their choice. Consequently, whether a single point of contact or more than one is created is uncertain. Pursuant to Recital 73, fourth sentence, CDSMD, collective bargaining is expressly envisaged as one possible mechanism to implement the principle of appropriate and proportionate remuneration. Moreover, collecting societies are subject to numerous obligations and controls, in particular concerning transparency and the determination of the fees. These minimize unbalanced outcomes.

Eighthly, the impacts on fundamental rights and, in particular, the freedom to conduct a business: Freedom of contracts is expressly mentioned in the CDSMD. However, it is not absolute and national legislations can limit its scope. The EU legislature's intervention is based precisely on the fact that in the cultural sector such freedom alone leads to structurally unfair solutions and the interests of authors and performers are often overridden by the interests of contractual counterparties. Excessive insistence on this boundary could be detrimental to the objective pursued, that is to protect weaker parties in exploitation contracts.

Ninthly, the relation with previous remuneration rights: The Belgian residual remuneration rights are not the first ones ever.[180] These mechanisms have already

[177] Although it is argued that limitation-based remuneration rights, as an expression of the social function of property, are not problematic *per se* with regard to the right to property. It depends solely on the circumstances and how effective the exclusive right would be to secure appropriate remuneration to the creators. *See* Geiger (2010a).

[178] *Cf.*, in relation to the obligation to provide appropriate remuneration for periods of training in specialzsed medicine, CJEU, 25 February 1999, Case C-131/97, *Annalisa Carbonari and others v. Università degli Studi di Bologna and others*, EU:C:1999:98, para. 46: "as to which institution bears the obligation to pay the appropriate remuneration, it is clear […] that neither the coordination directive nor Directive 82/76 identifies the body liable to provide remuneration for the periods of training in medical specialties and that, as a consequence, Member States enjoy a broad discretion in determining that body".

[179] *See*, in this sense, Bulayenko (2020), pp. 674–678.

[180] *See supra* 4.1.

been employed at the national and international levels. For consistency, an examination at the EU level of a new residual remuneration right needs to consider the existence of these provisions.

Finally, the withdrawal of remuneration: This problem is not only theoretical. Indeed, even if authors and performers have an interest in being remunerated, in some circumstances the opposite may also be the case. Even the CDSMD explicitly guarantees the possibility of authorizing the use of works or performances for free.[181] In general, it does not seem that the presence of remuneration rights is by itself incompatible with the stipulation of free licenses. However, coordination appears necessary in order to preserve the free will of authors and performers.

Given all of the above, there are strong arguments for the general compatibility of the Belgian residual remuneration rights with the EU framework. This conclusion does not seem to be affected by the fact that the deployment of the system could require some adjustments and implementations. In any case, the CJEU has a unique opportunity to clarify how residual remuneration rights should be implemented concretely and the margins thereof. This will impact the similar mechanisms already provided and will be particularly relevant for future legislative initiatives.

4.2.4 The Italian Referral Concerning Publishers

The beneficiaries of Arts. 18–23 CDSMD are authors and performers. Consequently, these measures should not be interpreted to benefit, except indirectly, cultural enterprises. However, it could be questioned whether residual remuneration rights should be introduced also in relation to publishers and producers.[182]

The Italian transposition of Art. 15 CDSMD provides an example, through the peculiar construction of new Art. 43bis Italian Copyright Act.[183] In accordance with the text of the CDSMD, Art. 43bis(1) Italian Copyright Act recognizes to press publishers the exclusive rights of reproduction and communication to the public for the use of press publication by information society service providers. However, in addition, Art. 43bis(8) Italian Copyright Act also granted them a "fair compensation". A regulation of the Italian Communication Regulatory Authority determines the criteria.[184] The negotiation may be assisted by the same Authority in case the parties cannot reach an agreement.

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181 Recital 82 CDSMD.

182 *See*, in this sense, Senftleben and Izyumenko (2024), p. 43: "This raises the policy question whether similar protections should be developed for producers, who are in a weak bargaining position. Ultimately, this is a matter for lawmakers to consider. […] If collectively managed residual remuneration rights are deemed effective in ensuring fair compensation for authors and performers, legislators could also explore the viability of extending these rights to producers". However, there is no general investment-protection rationale in copyright law so that the protection of producers cannot benefit from the same justifications then those of creators. *See*, in this sense, Geiger (2022a). For this reason, we consider that residual remuneration rights should be regulatory tools to benefit creators primarily, if not exclusively.

183 *See* Scalzini (2024); Sganga and Contardi (2022).

184 *See* Italian Communication Regulatory Authority (AGCOM), Resolution No. 3/23/CONS of 19 January 2023, https://www.agcom.it/provvedimenti/delibera-3-23-cons.

In parallel, Art. 43bis(13) Italian Copyright Act implemented Art. 15(5) CDSMD. The EU legislature guaranteed that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive. However, the legislature did not specify the mechanisms to be introduced for this purpose.[185] Member States have adopted divergent solutions.[186] In Italy, authors of journalistic articles are entitled to receive a share, between 2% and 5%, of the remuneration right for press publishers. It is determined on a contractual basis for self-employed workers, and by collective agreement for employed workers. This remuneration right is created outside the scope of a corresponding exclusive right and seems standing only as a last guarantee in face of a progressive "neighborification" of copyright law.

In December 2023, the Italian Regional Administrative Court of Lazio referred some questions to the CJEU concerning the compatibility of Art. 43bis Italian Copyright Act with Art. 15 CDSMD, freedom to conduct a business, free competition, and proportionality.[187] In July 2025, the Advocate General issued his

[185] *See* Geiger and Bulayenko (2022), p. 437: "similarly to the cited Article 18(1), it also does not require member states to implement it by granting authors a right to remuneration. Yet it is one of the ways in which this provision of the DSM Directive could be transposed into the national laws of member states".

[186] *Cf.* Furgał (2021), pp. 891–892. *See*, *e.g.*, in France, Art. L. 218-5 French Intellectual Property Code, which delegates the determination of the share and the distribution modes to collective bargaining (to be differentiated for authors who are employees or freelances). Pursuant to Art. L. 218-5(1), second, third and fourth sentence, French Intellectual Property Code, if an agreement is not reached, a specific commission chaired by a representative of the State is empowered to help the negotiation and, as a last solution, to take a decision on the matter; in Spain, Art. 129bis Spanish Copyright Act, which empowers authors to resort to collective rights management for claiming the share, without differentiating among different work categories and without giving any other indication on the quantification of the remuneration due to the authors.

[187] *See* Italian Regional Administrative Court (TAR) of Lazio, 12 December 2023, Case No. 18790/2023, available (in Italian) at: https://portali.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_rm&nrg=202307093&nomeFile=202318790_01.html&subDir=Provvedimenti. An information society service provider demanded the annulment of the Resolution No. 3/23/CONS and its annexes due to the incompatibility with EU law and the fundamental rights under the Italian Constitution. The Court referred some questions to the CJEU, pending Case C-797/23, filed on 21 December 2023. Moreover, it suspended the effectiveness of the contested acts. Subsequently, the Italian Council of State, 11 March 2024, Case No. 894/2024, available (in Italian) at: https://portali.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=cds&nrg=202401135&nomeFile=202400894_15.html&subDir=Provvedimenti, rejected the suspension of the acts due to the absence of the requirement of danger in delay.

Opinion, underlining a profound disagreement as to the interpretation to be given to the provisions, particularly concerning the nature of the remuneration provided.[188]

This proceeding may recall the Belgian one, in particular the arguments developed in favor and against the remuneration mechanisms. However, the premises underlying the Italian and Belgian interventions differ drastically. In Italy, the beneficiaries are, in the first place, publishers. In Belgium, on the contrary, the beneficiaries are authors and performers.

The development of residual remuneration rights for publishers and producers should be avoided. Even certain publishers and producers could suffer from a weak bargaining position and an unfavorable situation against multinational players, copyright law may not be the appropriate forum to address these instances. Their introduction would rely on a different basis, notably the protection of investments.[189] Consequently, the fundamental rights coverage appears less strong, especially in a balancing with other interests. In protecting primarily authors and performers, rather than producers and publishers, copyright complies with one of its foundations. An assimilation of the two situations risks overshadowing creators. If not every economic input into the value chain of creative activities requires the grant of a property right,[190] this should also be true for remuneration rights. A

[188] Opinion AG Szpunar, 10 July 2025, Case C-797/23, ECLI:EU:C:2025:552, para. 17. According to the AG, the rights of press publishers do not have the general nature of copyright or other related rights and Member States enjoy a margin of discretion to ensure a fair share of the revenues to publishers. However, the use of the term “fair compensation” in Art. 43[bis] Italian Copyright Act is not opportune as it refers to a right to remuneration or compensation without any possibility for the rightholder to object to the use. This would be contrary to Art. 15 CDSMD, as it provides for exclusive rights and is a measure of full harmonization of the substantive content of these rights, therefore not admitting additional remuneration rights. In this framework, “fair compensation” should merely designate the remuneration which press publishers may obtain from ISSPs for the use of their publications following the assisted negotiations between the parties. Article 43[bis] Italian Copyright Act would be compatible with EU law as long as it does not deprive publishers of the possibility to refuse their authorisation or to give it free of charge and does not impose any payment obligation unrelated to any actual or intended use. In any case, public intervention mechanisms imposing obligations on ISSPs (*e.g.*, concerning negotiations, disclosure, and good faith) or conferring on a public entity certain powers to assist the parties (*e.g.*, monitor and impose penalties, define benchmark criteria, determine a non-binding amount in absence of agreement) could be admissible, as Member States have the power to organize the exercise of exclusive rights in such a way as to ensure their effectiveness. On the contrary, using the courts to force the other party to conclude a contract and give its authorisation should be precluded. *See* also Scalzini (2024), pp. 308–311, according to whom Art. 43[bis] Italian Copyright Act is worded in a way that does not take a clear position on whether or not it has introduced an obligation to contract or a mandatory payment of remuneration. According to the author, an interpretation of Art. 43[bis] as an obligation to contract or a mandatory payment of remuneration could not be deemed sustainable in light of the principle of proportionality, although a mechanism to assist the negotiation of the parties may be compatible. Sganga and Contardi (2022), p. 423: “This semantic choice [‘fair compensation’] is contextually and systematically suggestive. At a closer look, in fact, the negotiation and licensing mechanism described by the provision features hybrid elements, some of them making it resemble to forms of assisted or collective negotiations, others to mandatory licensing, collective licensing or private levy schemes”.

[189] *Cf.*, for press publishers, Recitals 54, fourth sentence, CDSMD.

[190] *See*, in this sense, Geiger et al. (2017), p. 10. *See*, for further references raising criticism of Art. 15 CDSMD, Opinion AG Szpunar, 10 July 2025, Case C-797/23, ECLI:EU:C:2025:552, n. 4.

thorough clarification of the functions and content of the provisions at issue is therefore urgent.[191]

From another perspective, providing the intervention of an independent authority, triggered by a negotiation of an exclusive right could be an idea that may be enhanced in the framework of Art. 18 CDSMD.[192] This authority could establish criteria and assist in the negotiations.[193]

4.3 Other Remuneration Rights *Per Se*

Article 18 CDSMD may have intersections also with other remuneration rights *per se*, created outside the scope of exclusive rights. In this regard, the Romanian experience in relation to Art. 8(2) RLD is particularly interesting. According to this provision, Member States are required to provide a single equitable remuneration paid by the user in case of broadcasting and communication to the public of phonograms. It is shared between the relevant performers and phonogram producers. In the transposition, Romanian law established a minimum flat-rate remuneration.[194] However, in 2018, this methodology was no longer imposed.[195]

After this amendment, a litigation started between a local radio broadcaster and a CMO.[196] In January 2024, the Court of Appeal of Bucharest referred questions to the CJEU. In particular, the national court asked if Art. 8(2) RLD[197] and Art. 16(2), second paragraph, Directive 2014/26/EU ("CRMD")[198], in conjunction with Arts. 17 (right to property) and 52 (scope and interpretation) EUCFR, require a minimum flat-rate remuneration for rightholders, irrespective of the revenue obtained or the cost incurred by broadcasting organizations. If not, the national court demanded clarification on the criteria for assessing such remuneration. If the remuneration was then deemed derisory, it demanded whether a national court is entitled or even

[191] *See*, for an analysis of the problem and for a proposal of an interpretative option able to strike a balance between intellectual property and freedom to conduct a business, Scalzini (2024).

[192] *See* Geiger and Mangal (2022).

[193] *See* also the dispute resolution procedure under the supervision of the Belgian Institute for Postal Services and Telecommunications, introduced by new Arts. XI.216/1 and XI.216/2 Belgian Code of Economic Law. It resulted in CJEU, pending Case C-663/24, filed on 9 October 2024, questions 1–3.

[194] Article 131 and 131[1] Romanian Copyright Act.

[195] Article II Law No. 74/2018.

[196] After its abrogation, a company operating a local radio broadcaster refused to pay the minimum flat rate, considering the law immediately applicable. In June 2019, the CMO for the related rights of phonogram producers filed an action before the Regional Court of Bucharest. In January 2022, the Court held that the minimum flat-rate remuneration was no applicable during the period in question. In parallel, the Romanian Copyright Office issued a decision ordering the CMO to cease collecting the minimum flat-rate remuneration, often requested to radio broadcasters due to insufficiency of declared revenues obtained. The appeal against this decision was dismissed. The CMO appealed against the judgment of the Regional Court before the Court of Appeal of Bucharest.

[197] *See also* Art. 15 WPPT.

[198] Pursuant to Art. 16(2), second paragraph, WPPT, tariffs for rights to remuneration shall be reasonable in relation to, *inter alia*, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organization.

obliged to ensure that rightholders receive appropriate remuneration, applying criteria other than the revenue declared by broadcasting organizations (e.g., the costs incurred in respect of the broadcasting activity, or the remuneration paid by similar broadcasters).

In July 2025, the CJEU issued its decision. According to the CJEU, EU law does not impose a minimum flat-rate remuneration for phonogram producers. Indeed, an equitable remuneration should take into consideration the economic value of the use of works. The determination of remuneration on the basis of broadcaster revenue alone seems admissible, since it makes it possible to take into consideration the economic capacity of local radio stations.[199] However, it is for the national court to verify whether the remuneration calculated according to the national rules is equitable or appropriate.[200]

This proceeding also underlines another open issue concerning Art. 18 CDSMD, that is the basis for calculating remuneration (e.g., the revenues without deduction of costs, the revenues with deduction of costs, or the sales price to the public). In principle, not taking into account production, marketing, and distribution costs, could be considered more transparent for the author and performer, as it can allow to not make the remuneration dependent on the commercial policy of the intermediary.[201] However, a differentiation should be drawn if the beneficiaries of the remuneration right are not only the performers, but also, as in the present case, the phonogram producers.[202]

4.4 Limitation-Based Remuneration Rights

Limitation-based remuneration rights, limited to specific cases and based on specific justifications, might be future-proofing solutions in order to generate substantial and fair earnings for creators, while at the same time allowing access to and re-uses of works, avoiding the blocking effect of exclusivity.[203] Ultimately, they could contribute to fostering innovation and creativity, as well as to place the authors and performers more at the center of the copyright system. Positive implications are also possible concerning the right to research.[204]

These mechanisms can have very positive implications, especially in sectors that otherwise are likely to be stagnant (i.e., where there are consolidated monopolies, high transaction costs for the licensing, or other impediments to the exploitation) or incontrollable (i.e., where creators are not able to monitor the exploitation of their

[199] CJEU, 10 July 2025, Case C-37/24, *UPFR v. DADA Music*, EU:C:2025:551, paras. 62–66.

[200] CJEU, 10 July 2025, Case C-37/24, *UPFR v. DADA Music*, EU:C:2025:551, para. 84.

[201] *Cf.*, in France, Cass. 1re civ., 26 January 1994, 92-11.691; Cass. 1re civ, 9 October 1984, 83-13.850; Cass. 1re civ., 9 January 1996, 92-19.080, 92-20.436, 92-20.489; CA Paris, 4e ch., 19 December 1991, 91-15.298; CA Paris, 4e ch., 7 July 1992, 89-13078, TGI Paris, 3e ch., 17 December 1990.

[202] *Cf.* Senftleben and Izyumenko (2024), p. 43: "If the CJEU concludes that EU law prohibits national laws that lack minimum equitable remuneration for phonogram producers, irrespective of broadcasters' revenues or costs, such an outcome may have repercussions on the relationship between European producers and online streaming platforms".

[203] Geiger, Schönherr and Jütte (2024), p. 113. *See also* Geiger and Jütte (2025).

[204] *See* Geiger and Jütte (2023), p. 80–81.

works and performance and enforce their rights or could encounter difficulties in obtaining a license in relation to existing works). In other words, they might contribute to remedy situations where, although formally guaranteed, the exercise of exclusive rights is substantially impossible or undesirable. This could be particularly true for the digital environment, where the interest in obtaining an effective remuneration may outweigh the interest in securing the control of every use of the work or the subject matter. Several examples can be provided.

Firstly, especially when creating and distributing on online platforms, a large number of authors and performers often incorporate protected elements in their creative processes.[205] Limitation-based remuneration rights would have the advantage of circumventing the authorization requirement, thereby reducing transaction costs and the possibility of potential access refusals, while at the same time entitling the initial creator to participate in the fruits generated. In other words, their implementation in favor of the initial creator for online commercial creative uses (i.e., when a derivative work generates revenues) could be a workable option in order to safeguard the rationales and the engine of copyright law.[206]

Secondly, limitation-based remuneration rights could also be a possible alternative in the context of training of generative AI models. Relying on single authorizations appears impractical. Indeed, this would imply gigantic transaction costs of one-to-one negotiations and the risk of incomplete datasets. At the same time, it could be complex to prove an infringement. These mechanisms would allow maximization of exploitable content for machine learning purposes, while taking into account the interest of the authors and performers to be fairly remunerated.[207]

Thirdly, the private copying regime[208] could be configured to encompass different digital mediums. Despite the already numerous pronouncements, the CJEU is currently required to clarify some still open issues.[209]

Limitation-based remuneration rights have already been adopted by several countries (e.g., for educational, news reporting, or religious purposes, and to facilitate access to the disabled)[210] and the revenues generated for creators can be substantial.[211] Support for these mechanisms has been expressed by several national courts, which recognized that remuneration rights can be, in certain situations, more

[205] *See*, in this sense, Geiger (2018); Geiger (2024); Geiger et al. (2024).

[206] Geiger (2017b). *See* also Senftleben and Izyumenko (2024), p. 37–42.

[207] *See* Geiger and Iaia (2024) and Geiger (2024), proposing a limitation-based remuneration right to the benefit of human creator. *See* also for a different non-exclusive remuneration model but with a similar rationale, Senftleben (2023).

[208] Article 5(2)(b) InfoSoc Directive.

[209] *See*, in this sense, Senftleben and Izyumenko (2024), pp. 35–37, underlining the uncertainty in relation to offline streaming copies, object of CJEU, pending Case C-496/24, filed on 17 July 2024.

[210] *See* Geiger and Bulayenko (2022); Ginsburg (2014).

[211] *See* Dietz (2003); Geiger (2008b); Dusollier and Ker (2009), p. 352; Geiger (2018), pp. 450–451, providing evidence looking at the private copy system.

beneficial for creators than exclusive rights, in particular because of the bigger share for authors resulting from them.[212] These are also in line with the position of the European Parliament, which underlined the necessity to ensure fair remuneration for creators and wide access to cultural and creative works.[213]

Several arguments in favor of the introduction of limitation-based remuneration rights have been developed elsewhere. In particular, it has been highlighted how international law leaves more room for creating statutory remuneration rights than is usually assumed and how they find justification in the fundamental rights framework, as they provide a compelling balance of the different fundamental rights involved.[214] What is worth pointing out in the context of this article is that limitation-based remuneration rights are now even more supported in the light of the attention on fair remuneration of creators brought about by Art. 18 CDSMD.

At first glance, there seems to be no room for the introduction of limitation-based remuneration rights as a mechanism to implement Art. 18 CDSMD. Indeed, it requires a license or transfer of exclusive rights for exploitation purposes. However, this provision appears embedded in a more general idea that stands in the fundamental protected core of copyright law, according to which all creators should share fairly in the economic success of their works.[215] It is in particular this more general principle of fair remuneration of authors and performers, within and beyond exploitation contracts, that should guide further steps to rationalize a system that has been widely recognized as inefficient and outdated. A future effective policy really aimed at achieving fair remuneration of authors and performers should thus embrace limitation-based remuneration rights.

Different aspects should be carefully scrutinized for their concrete operativity. Firstly, not every exception or limitation can be turned into a remuneration right. Uses of a work or performance strongly rooted in competing fundamental rights should not require a payment, either because copyright law at the international or

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[212] *See*, *e.g.*, German Federal Supreme Court, 11 July 2002, "*Elektronische Pressespiegel*", JZ 473; Swiss Supreme Court, 1st Civil Division, 26 June 2007, (2008) IIC 39, p. 990, commented by Geiger (2008a). *See* also Geiger (2018), p. 449; Geiger (2017b), p. 309; Shaheed (2014), para. 46; Geiger (2010a), p. 515.

[213] European Parliament (2021), para. 16. *See supra* 1.

[214] *See* Geiger and Bulayenko (2020), according to whom even the main obstacles that could be highlighted relating to the compliance with the three-step test and the constitutional protection of the general right to property appear to be surmountable. *See*, in this sense, Geiger (2017b), pp. 318–321, according to whom, in the case of the tree-step test, it could be affirmed that the "normal" exploitation in some cases could also be achieved by limitation-based remuneration rights and that the exclusive right only covers the right to oppose the sole identical copy of the work (primary market) and not its creative use (derived markets). In the case of the right to property, just like the right to physical property, also intellectual property can be limited in order to safeguard the public interest. *See* also Geiger et al. (2024), pp. 11–18.

[215] *Cf.*, German Federal Constitutional Court, 23 October 2013, Case 1 BvR 1842/11, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/10/rs20131023_1bvr184211en.html, paras. 87: "The fundamental idea of German copyright law is that authors should share equitably in the economic success of their works […]. The general attribution of the assets resulting from creative work to the authors as well as their freedom to dispose of them freely and to be able to exploit their work financially on equitable terms enjoy the protection of the fundamental right to property; they are the constitutionally protected core of copyright law".

regional level is exempting the use of any remuneration (this is the case for quotation and parody) or because the justification by competing fundamental rights is stronger. Remuneration rights should be formulated in such a way as to safeguard such freedom.

Secondly, the entitled subjects should be carefully defined. In some Member States, income for uses under exceptions or limitations (e.g., private copying, reprography, and public lending) is shared between authors and publishers.[216] The inclusion of publishers would be aimed at safeguarding their investments against the restriction of exclusive rights.[217] Pursuant to Art. 16(1) CDSMD, Member States may expressly maintain or introduce such income-sharing systems. Indeed, the transfer or licensing of a right from an author to a publisher[218] is considered to be a sufficient legal basis for the entitlement of the latter. With this provision, the EU legislator wanted to improve legal certainty after the CJEU ruled that publishers were not entitled to fair compensation *ab origine*.[219] Doing so, Art. 16 CDSMD seems to have an opposite rationale to Art. 18 CDSMD.[220] Nevertheless, Member States are not obliged to impose the sharing. Indeed, considering authors as the sole beneficiaries of the income is expressly deemed compatible with EU law. Using the wording of the CDSMD, this choice can be part of "national cultural policies".[221] Such policy decision seems more in line with the objective of fair remuneration of authors and performers. In this way, limitation-based remuneration rights would not compensate the rightsholder for the restriction of an exclusive right, but remunerate the author for the creation of a work. The distribution of income from remuneration rights is currently again at the center of a referral to the CJEU from Germany.[222] The Court will have to clarify whether publishers may indirectly benefit from

[216] Recital 60, third sentence, CDSMD.

[217] Recital 60, first and second sentence CDSMD.

[218] Pursuant Recital 60, first sentence, CDSMD, the notion of "publisher" expressly includes those of press publications, books or scientific publications and music publications. However, it could be interpreted extensively. *See*, in this sense, Nordemann and Strobl (2022).

[219] *See* Recital 60, fourth sentence, CDSMD. *See* CJEU, 12 November 2015, Case C-572/13, Reprobel, EU:C:215:750, paras. 44–49. According to the CJEU, the allocation *ab origine* to publishers of a part of the fair compensation for reprography and private copying pursuant to Art. 5(2)(b) InfoSoc Directive with no obligation to ensure that the authors of the works benefit, even indirectly, from some of that compensation was against EU law. *See*, concerning this ruling, European Copyright Society (2015); Sganga (2021), p. 829. *See* for the history of this provision, Rosati (2021), pp. 296–298.

[220] *Cf.* Sganga (2021), p. 829: "While in fact some of the provisions of the CDSMD Directive reinforce the Court's repeated attempt to put authors back at the center of the stage, privileging their position vis-à-vis other rightholders, Art. 16 CDSMD counterbalances this attitude, halting the CJEU's attempt to straitjacket freedom of contract and Member States' legislative discretion in the identification of rightholders and in the definition of their status, rank and interplay".

[221] Recital 60, fourth and fifth sentence, CDSMD. *Cf.* Ricolfi (2019), p. 60, according to whom the adoption of such a share is left to the choices of national legislators, which are limited by the respect of fundamental rights, and those who instituted systems also in favor of publishers must first assess their legitimacy under the former framework. Finally, pursuant to Art. 16(2) CDSMD, existing and future agreements on public lending rights are not prejudiced.

[222] German Federal Supreme Court, 21 November 2024, Case I ZR 135/23, available (in German) at: https://openjur.de/u/2498930.html; CJEU, pending Case C-840/24, filed on 10 December 2024. *See*, for a first comment, Kyrylenko (2025).

proceeds from private copying and lending managed by CMOs. The previous position in favor of authors and performers might be reconfirmed.

Thirdly, the amount of the payment: One of the purposes of remuneration rights, including limitation-based remuneration rights, is to remunerate creators. Consequently, its calculation should not be limited to a mere "compensation" for the harm suffered, but to a proper "remuneration".[223] In practice, two paths could be pursued: establish the amount by law or leave it to negotiations. Transparency obligations should safeguard these rights. A statutory organized mediation, eventually by an EU specialized authority on copyright, could play an important role.[224]

5 Conclusion

The CDSMD seeks to bring the attention of the copyright system back to authors and performers, providing some first steps toward the better protection of their remuneration interests. However, this text seems to fail to explicitly address some general weaknesses of copyright contract law, especially in the digital context. As we have discussed in this article, in many situations a mere contractual protection for authors and performers is not sufficiently efficient to protect the remuneration interests of creator, copyright contract law remaining often a toothless tiger.

For this reason, an effective implementation of the principle of appropriate and proportionate remuneration seems to require additional mechanisms. These should adopt a wide-ranging and forward-looking view regarding the creative process, and not just remedy structural deficiencies only afterwards and partially. Otherwise, the CDSMD could be deemed insufficiently transposed.

In this framework, wider use of statutory remuneration rights appears to be one of the best ways, next to those devised so far, which could really concretely achieve the remuneration rationale behind copyright law, particularly relevant for designing a fair and sustainable digital system. In particular, residual remuneration rights appear generally compatible with the architecture provided by Art. 18 CDSMD. Going beyond contractual means, also other remuneration rights *per se* and limitation-based remuneration rights could play an important role.

The several pending referrals to the CJEU on the matter could provide a major impulse towards the development of remuneration rights. From their initial analysis, important insights for the future can be drawn. Above all, it is evident that the pivot point of the discussions is the balance of fundamental rights. In this regard, the right

[223] *See* Geiger et al. (2014): "the author has a right to reward for a specific use of the work to which his or her exclusive right does, however, not extend"; Geiger (2017a, b), pp. 310–311: "It would be better to speak of limitations with remuneration (or "limitation-based remuneration claims") and limitation without remuneration. […] in certain situations a limitation-based right to remuneration might be more beneficial to the author than the exercise of his right to prohibit use of the work"; Geiger and Bulayenko (2022), p. 458: "The integration of a remuneration rationale in the structure of limitation-based remuneration rights could enable remuneration to rightholders beyond the mere 'harm' suffered"; Geiger et al. (2024), p. 18, underling that in the Wittem EU Copyright Code certain exceptions were permitted only on the condition of remuneration. *See*, on the contrary, CJEU, 12 November 2015, Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*, EU:C:2015:750.

[224] *See*, in this sense, Geiger and Mangal (2022).

of creators to be fairly remunerated for the commercial use of their works and performances benefits from strong justification and stands as a fundamental and binding principle of copyright law.[225] In this respect, exclusivity should only be considered as "one of the available tools in copyright's toolbox",[226] meaning that if efficient remuneration is best reached with other non-exclusive mechanisms, then there should not be any objection from a policy and principle perspective.[227]

To achieve the intended goals, remuneration rights can and should be concretely formulated in order to reward creators rather than compensate rightholders. The extension of the arguments in favor of authors and performers also to producers and publishers should be in general avoided. Indeed, their position remains substantially different.[228] A cultural policy that truly aims to fairly remunerate the creators should identify only authors and performers as beneficiaries of the copyright entitlements and modulate the amounts accordingly. It is time to separate more clearly the functions and the content of authors' and performers' rights from those related to the rights of producers, which have already been granted some rights on their own; new rights could be imagined to protect their investments in the future, but which would be then tailor-made for the purpose of being investment-protection mechanisms, so substantially smaller in scope and duration than authors rights.[229]

Currently, many major digital platforms that are used in Europe and major producers and publishers are based in the US. Consequently, the extraterritorial application of remuneration rights should be further scrutinized. On the contrary, the risk that any intervention may be easily circumvented is present.

[225] As we have already developed *supra*, this does not mean that every commercial use of a work or performance should be remunerated. Permitted uses currently exempted from remuneration at the international and European level and uses benefiting from a stronger fundamental rights justification should remain free of charge, as a result of the social function of copyright law. *See* on this Geiger (2013).

[226] *See* Geiger (2010a), p. 540 ff., recalling the famous "*schoolbook*" decision (BVerfG, 7 July 1971, [1972] GRUR 481), where the German Federal Constitutional Court held "'with the exclusion of the author's right to prohibit access, the public interest in having access to the cultural assets is satisfied sufficiently; this exclusion clearly defines the social obligation of copyright in this decisive area. It does not follow from Article 14 paragraph 2 of the Constitution, however, that in these cases the author would have to make his intellectual asset available to the general public free of charge'. It can thus be concluded that it should be possible to limit the author's exclusive right if it is required by important public interests. The remuneration, however, may be avoided only in the rarest cases. The scale of priorities can therefore be gathered relatively clearly: the remuneration is the most important aspect of the constitutional protection of copyright, the principle of exclusivity follows only behind it".

[227] Another issue is the compatibility of non-exclusive remuneration rights with international and regional copyright law, which cannot be addressed in detail here and certainly requires further research on a case-by-case basis. However, it was shown by other recent works, the international and EU framework is often much more open to remuneration rights than classically presented. Ultimately, even international and EU law can be revised if there is a mismatch between the objectives of the legislation and the results obtained.

[228] *See* Geiger (2022a, b).

[229] *See* further Geiger (2022a, b). For a (very pertinent) critique *see* also Hugenholtz (2019), arguing that "neighbouring rights based on technological investment that do not provide for a threshold test and corresponding rule of scope, such as the phonographic right, the broadcaster's right and Europe's film producer's right, are outdated and inherently unbalanced. The new press publisher's right introduced by the EU DSM Directive is similarly unbalanced".

After the CDSMD, it is important that the fair remuneration of the authors and performers continue to be addressed at the international level. Indeed, if every Member State proceeds on its own, there is a risk of deepening existing regulatory differences and fragmenting the European internal market. The establishment of a supranational remuneration system seems a path worth pursuing. Overall, it is long over due to (finally) reinstall the author at the center of the copyright system and to verify that – beyond dogma and vested interests – they are fairly remunerated for their crucial contributions to society. By doing so, it will also secure a better acceptance of copyright by strengthening its legitimacy.[230]

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